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Nos. 87-1622, 87-1697, and 87-1711
CONSOLIDATED

In The
Supreme Court of the United States
October Term, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND THE BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, QUINAULT INDIAN NATION, TULALIP TRIBES OF WASHINGTON, AND MUCKLESHOOT INDIAN TRIBE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The *amici curiae*—Confederated Tribes of the Colville Reservation, Quinault Indian Nation, Tulalip Tribes of Washington and the Muckleshoot Indian Tribe ("Tribes")—are federally recognized Indian tribes located in the State of Washington. They each occupy reservations set aside by the federal government for the overall purpose of providing a permanent homeland.[1] In

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[1]The main portion of the Colville Reservation encompasses approximately 1.3 million acres in Okanogan and Ferry Counties. Other Colville Reservation lands are scattered throughout north central Washington State. The Reservation lands are rich in water resources, which are of great importance to the Colvilles. The topography is mostly mountainous. Major land uses include timber harvesting and processing, grazing, dryland and irrigated farming, and recreation. Approximately 80 percent of the Reservation lands are held in trust by the Colvilles or their individual members. Some checkerboarding occurs, with most mixed land ownership found along the river valleys and adjacent to the towns that border the reservation.

The Quinault Indian Reservation, located on the Olympic Peninsula in Grays Harbor and Jefferson Counties, encompasses approximately 190,000 acres of mostly forested, undeveloped lands. Lake Quinault, two major rivers (the Queets and the Quinault), hundreds of smaller rivers and creeks and seventeen miles of coastline, all lie within the Reservation boundaries. As a result of allotment, trust and fee parcels are interspersed throughout the Reservation. Other parcels are a mixture of fee and trust ownership. This checkerboard pattern of land ownership is typical of land patterns on many reservations. A-1.

The Tulalip Indian Reservation is located on the eastern shore of Puget Sound in Snohomish County. It encompasses approximately 22,000 acres, or 35 square miles, of mostly forested, rolling land. Sixteen miles of saltwater tidelands, seven lakes, three major streams, a bay, and several miles of river shoreline all lie within the Reservation boundaries.

The Muckleshoot Indian Reservation, located in King and Pierce Counties, is approximately 3600 acres in size. The White River, which flows through the Reservation, is an important resource of the Tribe. The Reservation is located between the cities of Seattle and Tacoma, in an area of potential future growth. For the most part, the Reservation consists of farming and residential development, along with small commercial activities.

establishing these reservations, the United States led tribal ancestors to believe that, by settling upon them, tribes would be free to foster and preserve their way of life. *See, e.g., McClanahan v. Arizona Tax Com'n,* 411 U.S. 164, 174-175 (1973); *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 49 (9th Cir.), *cert. denied,* 452 U.S. 1092 (1981).

Consistent with this purpose and well-settled principles of federal Indian law, each of the Tribes have exercised some form of land use planning or zoning regulation over all of their reservation lands for many years.[2] The Tribes all have Planning Commissions and Planning Departments, staffed by professionals, that carry out comprehensive planning.[3] The Tribes' plans serve to identify areas deemed appropriate by the Tribes for low and high density residential growth, commercial and industrial development, and environmental protection. Each of the Tribes provides for judicial review or the quasi-judicial review that is typical in land use regulatory systems. *See e.g. Colville Confederated Tribes v. Cavenham Forest In-*

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[2]For example, the Quinault Nation adopted its first reservation-wide zoning ordinance in 1967, adopted the Uniform Building Code, and enacted its own sanitation ordinance. In 1974, the Quinault Comprehensive Plan was approved. The Tulalip adopted a reservation-wide land use plan in 1972. The Tulalips are in the process of updating that plan, and adopting a comprehensive zoning ordinance in accordance with the Tulalip's federally approved Planning Enabling Act. The Colville and Muckleshoot Tribes enacted reservation-wide land use ordinances in the 1970's.

[3]The Tribal Planning Commissions generally reflect the entire reservation communities. For example, the Tulalip's Planning Commission composition includes representatives from the tribal membership, the non-Indian community and the non-member Indian community. The Muckleshoot Tribe's zoning ordinance requires that at least one member of the Planning Commission must be a non-member who owns property on the reservation.

dustries, 14 Indian Law Rptr. 6043 (Colv. Tr. Ct. Nov. 16, 1987) (appeal pending).

The Tribes all have various degrees of on-going, cooperative relationships with the surrounding county and local governments. For example, Grays Harbor County and Jefferson County defer to the Quinault Nation's land use authority within its Reservation, and King County routinely refers all applicants to the Muckleshoot Tribe for permits for activities occurring on that Reservation. A-2 to A-6. In 1972 Snohomish County adopted the Tulalip's comprehensive land use plan, as the comprehensive plan for the Reservation.[4]

Reservation-wide zoning authority is crucial to the Tribes' ability to regulate the intensity and location of development in order to reflect their overall infrastructure planning.[5] Zoning and land use planning are traditionally areas of local concern. Tribes are the governmental entities with the greatest interest in the health and welfare of their reservations. Counties, on the other hand, generally do not have a great interest in reservations because lands within reservations usually make up only a small part of a county.

Zoning and comprehensive land use planning are critical tools in the implementation of fish and wildlife man-

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[4]Recently, a Snohomish County road project that would cross Tulalip tribal lands was reviewed and permitted pursuant to the Tulalip's zoning ordinance.

[5]For example, the Tulalip recently received Environmental Protection Agency (EPA) funding for expanding and improving its wastewater treatment facility (the only such facility serving the reservation), which is now at capacity. Although the Tribe is actively pursuing alternative sewage treatment measures, the county continues to allow projects using septic tanks in areas where septic systems have failed.

agement.[6] Fish and wildlife are resources of overriding importance to the Tribes. Each of the Tribes have exclusive on-reservation reserved fishing and hunting rights. *See e.g. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658 (1979); *Antoine v. Washington,* 420 U.S. 194 (1975). Fishing and hunting provide important economic and cultural benefits to the Tribes and their members. Protection of fish and wildlife habitat, through the regulation of development on all lands within reservations, is essential to the Tribes' goals of increasing fish and game populations.[7]

More than ten years ago, the Ninth Circuit articulated an important rationale for protecting tribal control over Indian reservations:

> . . . subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian politi-

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[6]Protection of tribal water resources is also served by the Tribes' reservation-wide land use regulations. For example, in 1985, the Colville adopted the Colville Water Quality Management Plan (CWQMP). The EPA considers the Plan a model non-point source pollution prevention program. *See,* EPA Journal, Vol. 12, No. 1 pp. 23-26 Jan/Feb 1986; EPA Journal Vol. 13, No. 3 pp. 28-31 April 1987. The CWQMP regulates activities that affect the quality of water resources of the Colville. The Colville's water quality standards are currently being promulgated as federal standards by the EPA, 53 Fed. Reg. 26968 (July 15, 1988), and their incorporation into the Colville's comprehensive plan and zoning controls is an important enforcement mechanism.

[7]For example, the Quinault Nation's Conservation Code, enacted in 1967, and replaced by a more detailed Conservation Code in 1984, regulates all hunting and fishing on the Reservation. The Conservation Code also regulates activity in and around Reservation waters and requires the issuance of a tribal hydraulic project approval before any such activity begins. These tribal laws attempt to strike a balance between the need to protect the Reservation environment, particularly the fishery resource, from the adverse effects of logging and other activities and the need to allow such activities, to provide economic benefits to Indian and non-Indian landowners.

> cal control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition and seek, under the guise of general regulations, to channel development elsewhere . . . .

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977). This Court has recognized these concerns. *Bryan v. Itasca County,* 426 U.S. 373, 388 n.14 (1976). Although the Tribes have been able to achieve some degree of cooperation with neighboring governments, the Tribes cannot rely on others to implement tribal goals and priorities, or protect tribal interests.[8]

Reservation-wide tribal zoning and planning have been effectuated on a number of reservations, in cooperation with neighboring jurisdictions, with substantial benefits to reservation communities. A ruling that Indian tribes lack land use regulatory authority over reservation fee lands would effectively destroy their ability to direct and regulate growth consistent with the unique needs and priorities of reservation communities. A ruling that, unlike all other governments, tribes must meet a stringent impact test, and repeatedly justify, on a case-by-case basis,

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[8]For example, even though Snohomish County adopted the Tulalip's comprehensive plan, the county's interpretation of that plan differs from the Tulalip's, and the county's zoning standards do not necessarily conform to the plan's land use designations. The county recently allowed an applicant who owns fee land on the reservation to include marshlands in calculating development density. The Tulalip would have excluded the marshlands from the buildable acreage because of the importance of marshlands to fish and wildlife. Moreover, in the reservation's northeast section, county zoning allows dwelling unit densities four times greater than those permitted by the Tulalip plan.

the exercise of zoning authority within their territories would perpetuate uncertainty in land use control and encourage continual legal challenges. This would not be consistent with the purposes for which Indian reservations were set aside—the promotion of tribal economic development and self-sufficiency—or prior case law.

SUMMARY OF ARGUMENT

In this case, the Court is presented with many of the same arguments that it has heard and rejected before concerning tribal civil regulatory authority over non-Indians on Indian reservations. This Court has rebuffed the notion that federally authorized land purchases within reservations by non-Indians preclude tribal regulatory authority. Further, petitioners' speculative claims of the alleged unfairness of the tribal land use process are not ripe for review in this case.

Comprehensive zoning is essential to the exercise of tribal sovereignty. Zoning is integral to the tribes' ability to protect the health and welfare of their reservation communities, and it is the sole means of ensuring comprehensive planning on reservations. All three branches of the federal government have recognized this tribal authority as necessary.

ARGUMENT

I. NONE OF THE ARGUMENTS RAISED BY PETITIONERS PRECLUDE TRIBAL LAND USE REGULATION OF NON-INDIANS WITHIN INDIAN RESERVATIONS.

A. Neither Federally Authorized Land Purchases, Nor A Substantial Non-Indian Presence On The Reservation, Nor The Fifth Amendment Divest Indian Tribes Of Their Authority Over Reservation Lands.

The arguments against tribal jurisdiction raised by Petitioners and their supporting *amici* (*see e.g.* Brief of the States of Arizona *et al.* at 2-4) are the same arguments this Court has heard and rejected before. In 1904, when the Court upheld the Chickasaw Nation's power to tax non-Indian owned property within its Reservation, similar contentions were made about the federal allotment act "promises," the effects of non-Indian land ownership and towns within tribal territory, and the inability to participate in tribal government. *See, Morris v. Hitchcock*, 194 U.S. 384 (1904).

In *Morris,* non-Indian owners of cattle and horses in the Chickasaw territory challenged an annual tribal tax on their animals. They argued federal Indian policy had undergone a radical change since the treaties were signed. Originally the federal policy was to ensure that reservations were exclusively for tribes. By the late 1800's, however, that policy had shifted. Non-Indians were then permitted to buy and own land, and incorporate towns on the reservations. A-30. (Excerpts of the *Morris* record are contained in the Appendix at A-10 to A-31.) According to the *Morris* plaintiffs, there were roughly 150,000 white inhabitants, and only 8,000 people "claiming" to be Indians on the Chickasaw Reservation. A-25 to A-27. The *Morris* plaintiffs argued that enforcement of the tax had insufficient judicial checks, and the tribal tax violated their due process rights. A-11 to A-17, A-23 to A-24, A-27 to A-29.

The *Morris* plaintiffs also argued that the tribal tax was repugnant to the Fourth and Fifth Amendments to the Constitution. A-22. In the Court of Appeals, they contended tribal sovereignty could not extend to them be-

cause they had no voice in tribal government. *Morris v. Hitchcock*, 21 App. D.C. 565, 577 (1903). The Court of Appeals said:

> A government of this kind necessarily has the power to maintain the existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinance's power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication. . . . Where the restriction upon this exercise of power by a recognized government is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction. . . .

21 App. D.C. at 593. This Court affirmed, noting that Congress had permitted "the continued exercise, by the legislative body of the tribe, of such [taxing] power. . . ." 194 U.S. at 393. The purchase of lands, the Court noted, did not affect the right of a tribe to regulate non-Indian activities. *Id.* at 391-92.

In *Morris*, the Curtis Act of June 28, 1898, 30 Stat. 495, authorized purchases of Indian lands. *See* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) p. 774. The act abolished the tribal courts of the Five Civilized Tribes and reflected a federal policy to terminate those tribes. *See*, F. Cohen, *Handbook of Federal Indian Law* (1942 ed.) pp. 429-430. However, the termination had not yet been accomplished and the territory was still Indian country. Quoting with approval a 1900 Attorney General Opinion, this Court said:

> The provisions of the Act of June 28, 1898 (30 Stat. 495) for the organization of cities and towns in said

> Indian country, and the extinguishment of Indian title therein have not yet been consummated, and it is still Indian country. This act does not deprive these Indians of the power to enact laws with regard to licenses and taxes, nor exempt purchasers of town or city lots from the operation of such legislation. Purchasers of lots do so with notice of existing Indian treaties, with full knowledge that they can only occupy them by permission from the Indians. Such lands are sold under the assumption that the purchasers will comply with the local laws.

Morris, 194 U.S. at 391-92.[9]

A year later, the Eighth Circuit explained why non-Indians should not have assumed their federally authorized land purchases within an Indian reservation immunized them from tribal regulation:

> But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with the power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a State, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership or occupancy of the land within its territorial jurisdiction by citizens or foreigners.

Buster v. Wright, 135 F. 947, 951 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). This Court recently concurred in this statement and, emphasizing that tribal regulatory authority over nonmembers survives their acquisi-

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[9]The Attorney General had concluded that "even if the Indian title to the particular lots sold had been extinguished . . . . the result is the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." 23 Op. Att'y Gen. 214, 217 (1900).

tion of title to reservation land, held that the tribal right to exclude nonmembers from tribal land is not the sole basis for taxing them. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 143-44 (1982).

This Court has characterized as "untenable" the argument that federal allotment policy, reflected in the General Allotment Act, exempted fee patent lands from being treated the same as other reservation lands for jurisdictional purposes. *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 477-79 (1976).[10] *See also, Cardin v. DeLaCruz,* 671 F.2d 363, 367 n.5 (9th Cir.), *cert. denied* 459 U.S. 967 (1982). Although the General Allotment Act provided for state jurisdiction after a reservation was entirely allotted and the trust period for all reservation parcels expired, this act did not change the jurisdictional relationships between tribes and states. *Moe,* 425 U.S. at 477.

This Court has repeatedly rejected the notion that opening an Indian reservation to non-Indian settlement automatically diminishes the status of non-Indian owned

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[10]Although petitioners rely heavily on the General Allotment Act to argue against tribal jurisdiction, the Yakima Reservation was, in fact, allotted and parcels sold pursuant to special treaty provisions and not pursuant to the General Allotment Act. The General Allotment Act provisions on alienation and jurisdiction do not apply to reservations allotted pursuant to a treaty. *See United States v. Celestine,* 215 U.S. 278 (1909); *Snohomish County v. Seattle Disposal Co.,* 70 Wn.2d 668, 670-71, 425 P.2d 22, 25, *cert. denied* 389 U.S. 1016 (1967). Those treaty provisions gave no indication tribal sovereignty on the Reservation would be lost over lands sold to non-Indians. Those treaty provisions must be read *in pari materia* with provisions promising tribal control over non-Indians who desire to enter the reservation and in accordance with the likely Indian understanding. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.,* 443 U.S. 658, 675-76 (1979).

lands as Indian country. *See, Mattz v. Arnett,* 412 U.S. 481, 504-05 (1973); *Seymour v. Superintendent,* 368 U.S. 351, 356-57 (1962); *United States v. Celestine,* 215 U.S. 278 (1909). *See also* 18 U.S.C. § 1151. Any Congressional intent to diminish tribal authority must be clearly expressed. *See, Merrion,* 455 U.S. at 148-49, and n.14; *Bryan v. Itasca County,* 426 U.S. 373, 388-89 and n.14 (1976); *Morris v. Hitchcock,* 194 U.S. at 392-93.

While the petitioners claim that General Allotment Act purchasers were "promised" immunity from tribal governmental authority, they point to no statutory language making such a promise.[11] On the other hand, this Court has considered treaty provisions setting aside an Indian reservation for a tribe's exclusive use and occupancy and excluding non-Indians. The Court has found that the intent of these provisions was to place reservations under exclusive tribal sovereignty, subject to general federal supervision. *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 174-75 (1973). *See also, Confed-*

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[11]In support of their position, petitioners maintain that land ownership patterns on reservations have remained static since the effects of the Allotment Act were noticed. In fact, the opposite is true. For example, the Yakima Nation's land consolidation program has reversed the land ownership trend started by the allotment process. At Tulalip, tribal housing and economic development programs have resulted in the reservation's Indian population increasing at a greater rate than the reservation's non-Indian population. Moreover, non-Indian population statistics include a substantial number of non-Indians who lease waterfront lands from the Tulalip, having been attracted to the reservation by the unique environmental amenities there.

erated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 963 n.30 (9th Cir.), *cert denied* 459 U.S. 977 (1982).[12]

B. The Indian Reorganization Act Preserved Tribal Sovereignty.

Petitioners' claim that the Indian Reorganization Act (IRA), which was passed in order to reconfirm tribal sovereignty, somehow actually diminished that sovereignty, is without merit.[13] Congress passed the Act to advance tribal self-government, not to stifle it. The IRA does nothing to limit tribal authority over nonmembers. *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 471 U.S. 195, 199 (1985) (Congressionally acknowledged tribal authority to tax nonmembers preserved by IRA).

C. The Inability Of Non-Indians To Vote In Tribal Elections Is Not A Bar To The Exercise Of Tribal Sovereignty.

As held in *United States v. Mazurie*, the fact that non-Indian landowners cannot become tribal members or vote

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[12]The petitioners' interpretation of *Montana v. United States*, 450 U.S. 544 (1981), and the effect of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and the General Allotment Act on tribal civil jurisdiction, is inconsistent with this Court's prior rulings in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). It also contradicts this Court's interpretation of *Montana* contained in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

[13]Continuing Congressional recognition, after the IRA, that tribes have governmental authority over non-members is reflected in provisions of the Indian Civil Rights Act (ICRA). 25 U.S.C. §§ 1301-1362. For example, 25 U.S.C. § 1302(5) prohibits tribes from taking "any private property for a public use without just compensation." The acknowledged power of tribes to tax non-Indians was one of the factors leading Senator Ervin to sponsor the ICRA. *See*, 107 Cong. Rec. 17121 (1961); Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 88th Cong. 2d Sess. 4-6 (1964). The takings restriction is consistent with the ordinary limits on permissible zoning authority.

in tribal elections does not preclude an exercise of tribal sovereignty over non-Indians, or Congressional delegation of tribal regulatory authority.[14] 419 U.S. 544, 557-58 (1975). *See, Morton v. Mancari,* 417 U.S. 535, 554-55 (1974); *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d at 964 n.31. *See also* 43 Op. Atty. Gen. Oregon 169, 180-81 (1983) reprinted in the appendix at A-53 to A-55. In *Mazurie,* this Court explicitly rejected the Tenth Circuit's characterization of tribal sovereignty, echoed by petitioners, as limited to members, with tribal powers over non-members commensurate with those of a landowner or private voluntary organization. *Mazurie,* 419 U.S. at 556-57.

The determining factor in a government's exercise of zoning authority is whether the land is within the borders of that government, and not whether one can vote. Many landowners do not reside in the area of their landholdings, and, of course, businesses cannot vote. The essential protection of landowners against arbitrary zoning actions by government is due process, not the ability to vote.

D. Petitioners' Assertions That Tribal Zoning Decisions Are Potentially Unfair Are Not Ripe For Review And Are Unfounded.

Petitioners and their supporting *amici* also make vague, sweeping allegations that tribal land use decisions would be unfair. It is premature for the Court to reach

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[14]Contrary to petitioners' assertions, non-Indians do participate in tribal government, particularly in the area of land use. Many tribes provide for the representation of non-Indians on decisionmaking bodies that regulate the reservation environment. See footnote 3 *supra*.

these issues in this case. In land use cases, this Court has gone to great pains to ensure that such decisions are final, and all review avenues exhausted, before ruling on the appropriateness of the particular land use decision. *See e.g. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (issues not ripe because land owner had not received a final decision on its application, nor exhausted review procedures). The petitioners have never applied for tribal permits, nor have they participated in the tribal land use process. Their allegations are mere speculation. Thus, the present case is similar to *Euclid v. Ambler Realty Co.*, 272 U.S. 379 (1926), which upheld generally the power to zone, but left to later cases whether a particular land use decision was valid. *Compare Euclid* with *Nectow v. City of Cambridge*, 277 U.S. 185 (1928).[15]

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[15]It is claimed that non-Indians will be harmed by arbitrary tribal action because it is not "subject to any effective judicial checks". *See* e.g. Brief of Arizona *et al. at 2*. Yet no evidence has been offered to discredit the integrity of tribal review forums in the area of land use. Similar arguments were made and rejected by the Court in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court noted that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Non judicial tribal institutions also have been recognized as competent law applying bodies." *Id.* at 65-66 and nn. 21 and 22. (citation omitted). *See generally*, Taylor, "Modern Practice in Indian Courts," 10 *UPS Law Review* 231, 252-259 (1987). Tribal courts should have the initial opportunity to determine their own jurisdiction involving disputes over the on-reservation activities of non-Indians. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians*, — F.2d — (8th Cir. 1988); *Brown v. Washoe*

(Continued on following page)

II. COMPREHENSIVE ZONING IS ESSENTIAL TO TRIBAL SOVEREIGNTY.

A. Zoning Is Integral To A Government's Responsibility To Protect Health And Welfare.

The exercise of zoning authority by tribes over non-Indian activities on reservations falls within the "health and welfare" exception articulated by this Court in *Montana v. United States*, 450 U.S. 544, 566 (1981). This Court first recognized over sixty years ago that, in order to protect the health and welfare of a community, a government must be able to exercise comprehensive regulatory powers over lands within its borders. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Accord Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). The ability to regulate the use of land is one of the most basic indicia of governmental authority.

Simply because non-Indians are able to own land within reservations does not change the purpose of Indian reservations. The purpose still is to provide places where Indians can preserve and protect their way of life. This

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(Continued from previous page)

Housing Authority, 835 F.2d 1327 (10th Cir. 1988); *United States v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987); *Wellman v. Chevron U.S.A. Inc.*, 815 F.2d 577 (9th Cir. 1987); *Snowbird Constr. Co. v. United States*, 666 F.Supp. 1437 (D. Idaho 1987).

Tribal courts can have inherent jurisdiction to review tribal land use decisions involving non-Indians. The Court recognized in *Iowa Mutual* that:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.
>
> Civil jurisdiction over such activities [of non-Indians] presumptively lies in the tribal court unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. at —; 107 S.Ct. at 978.

Court has previously recognized the importance of zoning to foster and protect a certain quality of life. "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephram*, 452 U.S. 61, 68 (1981); *See also Knight v. Shoshone and Arapahoe Tribes*, 670 F.2d 900, 903-04 (10th Cir. 1982).

B. Tribal Zoning Authority Is The Sole Means Of Ensuring Comprehensive Planning On Reservations.

The fundamental purpose behind land use planning is to provide a comprehensive process for the regulation of lands within a given area. It is uncontested that tribes have exclusive authority over trust and restricted lands within Indian reservations. *See*, Yakima County Brief at 6 and 22.[16] *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977). It necessarily follows that, in order to ensure comprehensive planning, tribes must have the ability to exercise zoning authority over their entire reservations. To hold otherwise would entirely defeat the primary purpose of land use planning. This is precisely the view of the Ninth Circuit: "If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme." *Confederated Tribes of the Yakima Indian Nation v. Whiteside*,

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[16]Yakima County necessarily concedes that the Yakima Nation has zoning authority over at least some non-Indian lands on that reservation. It did not even file a petition for *certiorari* with this Court in the *Brendale* case.

828 F.2d 529, 534-35 (9th Cir. 1987). The necessity of comprehensive tribal regulation has also been recognized in other contexts.

In *Lummi Tribe v. Hallauer,* 9 Indian Law Rptr. 3025 (W.D. Wash 1982), for example, the court recognized the unworkability of overlapping sewer districts on the Lummi Reservation. The court found that tribal regulation of a sewer system serving the entire Reservation was necessary to protect the economic security, health and welfare of the Lummi Tribe. The court recognized that to allow non-Indians to create ". . . another entity whose boundaries 'gerrymander' around and through the Reservation sewer district could lead to a lack of consistency and uniformity in the administration and operation of the Tribe's system." *Id.* at 3027. Accordingly, the court upheld the tribal requirement for non-Indians to hook up to the Tribe's system.

Another example is *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir.), *cert. denied* 454 U.S. 1092 (1981) where the court addressed the State of Washington's attempt to regulate a nonnavigable water system located entirely within the Colville Reservation. In holding that the state's regulatory power was preempted, the court stated: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." *Id.* at 52. The same is true regarding land use.

This Court has also invalidated state attempts to impose taxing and regulatory schemes on Indian reservations. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 462 (1976). In *Moe* this Court concluded

that checkerboard jurisdiction runs contrary to the intent of federal law. *Id.* at 478.

> Congress . . . has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

Id. at 479.

> Concurrent state jurisdiction would supplant this [tribal] regulatory scheme with an inconsistent dual system: members would be governed by tribal ordinances while non-members would be regulated by general state . . . laws. . . . Tribal ordinances reflect the specific needs of the reservation. . . . State laws in contrast are based upon considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation.

Mescalero, 462 U.S. at 339. As discussed in Section III. *infra,* Congress has evinced an intent that tribes, as the local managers of the reservation environment, have regulatory authority over all persons and lands on reservations.

The checkerboarding, typified by the map of the Quinault Reservation (A-1), highlights the need for unitary management over reservations—a need only tribes can provide. This checkerboarding is not confined to separate parcels of land, but also includes undivided non-Indian fee interests in trust or restricted parcels. Fee lands include non-Indian lands inherited from Indians, such as petitioner Brendale's property, as well as Indian owned fee lands.

C. The Courts Have Uniformly Upheld Tribal Authority To Zone.

The courts have consistently upheld tribal authority to regulate land use on reservation fee lands, as well as

trust or restricted lands. "It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its land." *Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1393 (9th Cir. 1987). *See, Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977). *Accord, United States v. County of Humboldt,* 615 F.2d 1260 (9th Cir. 1980); *Snohomish County v. Seattle Disposal Co.,* 70 Wn.2d 668, 425 P.2d 22, *cert. denied,* 389 U.S. 1016 (1967). *See also,* 25 CFR § 1.4.

In *Knight v. Shoshone and Arapahoe Tribes,* 670 F.2d 900 (10th Cir. 1982), the Tenth Circuit upheld the jurisdiction of the Shoshone and Arapahoe Tribes to enforce their zoning regulations against non-Indian owners of fee lands on the Wind River Reservation, stating:

> The developers argue that the Tribes have no authority to control the use of fee land by non-Indians without a delegation by Congress of such power. We disagree. Indians Tribes have "attributes of sovereignty over both their members and their territory." Included in the tribal power is "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." Civil Jurisdiction is distinguishable from the criminal jurisdiction over non-Indians which was denied in *Oliphant v. Suquamish Indian Tribe.*

Id. at 902. (citations omitted)

The court then considered whether a treaty or Congress had affected those Tribes' power:

> In the situation presented no treaty provision is of any pertinence and Congress has not acted to delegate or deny the right to control use of non-Indian owned land located within a reservation. Denial of the right does not arise by implication as a necessary result of their [tribes] dependent status. *Montana v. United*

> *States*, recognizes that: "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." One proper form of the exercise of that power may be in response to "conduct [which] threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe."

Id. (citations omitted)

Problems arise when tribes and counties have conflicting land use plans for reservation fee lands. In *Governing Council of the Pinoleville Indian Community v. Mendocino County*, 684 F.Supp. 1042 (N.D. Cal. 1988), the tribe imposed a one-year moratorium on new industrial uses on the reservation. Shortly thereafter, Mendocino County issued permits for the construction and operation of an asphalt batch plant and a concrete plant within the reservation. The Court held the moratorium applicable to the non-Indian development, despite issuance of permits by Mendocino County.

The *Pinoleville* case is not an isolated case. In *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir.), *cert. denied* 459 U.S. 967 (1982), a non-Indian whose grocery store was located on his reservation fee land had been directed by the Quinault Nation to correct a number of health and safety hazards identified by a tribal health inspector. These included fire hazards, food exposed to rodent contamination, several unlocked refrigerators in open areas threatening the lives of children who played in the area, and an open garbage dump near the store. The Quinault Nation extended numerous opportunities to the owner to clean up his property. When the non-Indian sued, the court upheld the Quinault's authority to regulate non-Indians.

The Quinault zoning authority over reservation fee land was specifically upheld in *Sechrist v. Quinault Indian Nation,* 9 Indian Law Rptr. 3064 (W.D. Wash. 1982). In that case, a California resident who owned fee land on the reservation wanted to construct and operate a recreational vehicle park and campground. He submitted a rezone proposal to the Quinault Land Use Planning Commission in order to be able to develop the park. When Mr. Sechrist lost his bid to have the land zoned from wilderness to commercial, he filed a separate action in federal district court, which upheld the Quinault Nation's zoning authority.

In *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir.), *cert. denied* 459 U.S. 977 (1982), the Confederated Tribes asserted regulatory authority over the manner in which non-Indians who owned land on the Reservation bordering Flathead Lake exercised their riparian rights. In applying the *Montana* health and welfare principle, the court upheld the Confederated Tribes' authority because:

> The conduct the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes. This conduct, if unregulated, could increase water pollution, damage the ecology of the lake, and interfere with treaty rights or otherwise harm the lake which is one of the most important tribal resources. Hence, the challenged ordinance falls squarely within the exception recognized in *Montana.* (footnote omitted.)

Id. at 964.

The courts are not alone in recognizing tribal authority to zone Reservation fee land. Recognition of these principles also led the Attorney General for the State of

Oregon to conclude that the Umatilla Tribe has exclusive jurisdiction over all land-use activities on the Umatilla Reservation. A-32 to A-57. *See also* Letter opinion, Attorney General of Wisconsin to Vilas County District Attorney (Oct. 19, 1982). A-58 to A-63.

III. THE EXECUTIVE AND LEGISLATIVE BRANCHES OF THE FEDERAL GOVERNMENT RECOGNIZE AND PROMOTE COMPREHENSIVE TRIBAL AUTHORITY OVER THE RESERVATION ENVIRONMENT.

The Executive Branch and Congress have long recognized an Indian tribe's sovereign authority over its members and its territory. Powers of Indian Tribes, 55 I.D. 14, 50 (1934). "Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which tribes have a significant interest, 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855)...." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Iowa Mutual Insurance Co. v. La Plante*, 480 U.S. 9 (1987).

A. The Executive Branch.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. 6 Weekly Comp. Pres. Doc. 894 (July 8, 1970). At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. President Reagan reaffirmed this commitment in his 1983 Indian

Policy Statement. 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).[17]

The policies and discretionary programs of EPA also reflect the federal commitment to tribal self-regulation. In June of 1982, the Administrator of EPA directed the EPA Office of Federal Activities to coordinate a study to examine the special legal and political factors affecting EPA program management on Indian lands and to consider the merits of various programmatic and resource options for Indian reservations consistent with President Reagan's Indian Policy. This study, entitled Administration Of Environmental Programs On Indian Lands (Indian Lands Study), was released in July, 1983.[18]

In noting that state governments generally lack adequate regulatory authority within Indian reservations, EPA determined that states could not fulfill, on Indian lands, the regulatory role intended by Congress for local implementing governments. EPA also emphasized that Congress did not specifically provide for the state assump-

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[17]Zoning decisions can affect the types of commercial and industrial projects on reservations and correspondingly, the job and other economic development opportunities available there. Promoting tribal efforts to direct economic development consistent with Indian interests is a major component of the federal policy. Comprehensive zoning authority is essential to achieving these economic development goals. For example, Colville's timber related and recreational enterprises, which employ many tribal members, are dependent on the Tribe's ability to protect forestry and water resources.

[18]The Indian Lands Study was a further refinement of the Agency's earlier efforts to work with tribal governments toward the implementation of a uniform national Indian environmental policy. In December 1980, following more than two years of development, EPA released its Policy For Program Administration On American Indian Reservations. A-64 to A-75.

tion of regulatory powers over reservation affairs. EPA summarized the basis for its policy decision as follows:

> Indian governments have the fundamental legal jurisdiction, generally lacked by state governments, to regulate both Indian and non-Indian pollution sources on the reservation. . . . The tribal interest and potential capability in the environmental arena constitute a national resource with environmental benefits extending beyond the reservation boundaries.
>
> The environment is generally best protected by those who have the concern and ability to protect it. Indian people show an acute sensitivity to their loss of great tracts in this country. . . . This historical fact, combined with a long-standing cultural respect for the earth and its environment, is reflected in tribal expressions of concern for the land, its irreplaceability and the importance of its environmental quality. Certainly, if the principle favoring local stewardship of the environment has meaning anywhere, it is on the Indian reservation.

A-69 to A-70. EPA concluded that the promotion of comprehensive environmental management by tribes was consistent with the overall aims and objectives of the federal environmental laws, and that Indian people should have a central role in decisions affecting the future of reservation life.

On November 8, 1984, then Administrator for EPA, William Ruckelshaus, issued an updated EPA Policy For The Administration Of Environmental Programs On Indian Reservations. Administrator Ruckelshaus stated, "It is the purpose of this statement to consolidate and expand on existing EPA Indian policy statements in a manner consistent with the overall federal position in support of tribal 'self-government' and 'government-to-government'

relations between federal and tribal governments." A-76. The policy set forth nine directives that the EPA would follow in implementing environmental programs on reservation lands. A-78 to A-83.

EPA's Policy has been approved by the courts. The EPA's determination that Washington's delegated hazardous waste program under the Resource Conservation and Recovery Act (RCRA) did not extend to Indian country, was upheld in *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). The Court concurred with EPA's determination that the term Indian lands is synonymous with the definition of Indian country and, therefore, includes fee and trust lands on Indian reservations. *Id.* at 1467 n.1. The Ninth Circuit went on to find that "the backdrop of tribal sovereignty, in light of federal policies encouraging Indian self-government, consequently supports EPA's interpretation of R.C.R.A." *Id.* at 1472.

B. The Legislative Branch.

Congress responded to President Nixon's strong expression supporting Indian self-determination when it enacted the Indian Self-Determination Act in 1975. 25 U.S.C. §§ 450-450n, 455-458e. Subsequently, Congress enacted a number of environmental statutes that recognize tribal authority over policy making and program administration as to all reservation lands, and provide additional mechanisms for tribes to protect the reservation environment. Tribal authority over reservation lands must be maintained over all reservation lands because of the significant interrelationship between land use regulation and environmental protection.

The Water Quality Amendments of 1987 (CWA), Pub. L. 100-4, § 506, 33 U.S.C. § 1377, are the clearest expression of this congressional recognition. Under the 1987 amendments, the Administrator of EPA is authorized to treat an Indian tribe as a state if "the functions to be exercised by the tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, *or otherwise within the borders of an Indian reservation.*" 33 U.S.C. § 1377(e)(2) (emphasis added). In keeping with Congress' restrictive view of the reach of state regulatory jurisdiction over Indian lands, Senate debate during the 1977 amendments to the original Federal Water Pollution Control Act acknowledged that the Act did not provide state regulatory jurisdiction over Indian lands. *See*, 123 Cong. Rec. 513.605 (daily ed. Aug. 4, 1977).

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Act allows Indian tribes to submit reservation-wide pesticide use plans for approval by the Administrator of the EPA, to certify and license pesticide applicators and to maintain primary enforcement responsibility for pesticide use violations occurring on reservations.[19] 7 U.S.C. § 136u.

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[19]As is true of other areas of federal environmental regulation, such as air pollution control, reservation-wide tribal authority was recognized by the Executive branch even before Congress enacted such provisions. In 1971, the Department of Interior had approved a Shoshone-Bannock tribal ordinance which prohibited all aerial spraying of herbicides on the Fort Hall Reservation. This ordinance applied to Indians and non-Indians alike. 78 I.D. 229 (April 19, 1971).

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, acknowledges the exclusive authority of Indian tribes to redesignate their reservation airsheds and to prevent significant deterioration of reservation air quality. "Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated *only* by the appropriate Indian governing body." 42 U.S.C. § 7474(c) (emphasis added).[20]

The Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-73 § 207, 42 U.S.C. § 9626, which amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), directs EPA to treat Indian tribes in the same manner as states with respect to numerous provisions of CERCLA. Congress also directed the President to conduct a survey to determine the extent of hazardous waste sites on Indian lands and make recommendations on the program needs of Indian tribes under the Act with an emphasis on "how tribal participation in the administration of such programs can be maximized." 42 U.S.C. § 9626(c).

The Safe Drinking Water Act Amendments of 1986 (SDWA), P.L. 99-339, § 302, 42 U.S.C. § 300j-11, authorizes EPA to treat Indian tribes as states, enables the Administrator to authorize primary enforcement responsibility for public water systems and underground injection control, and provides direct grant and contract assistance

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[20]The amendment tacitly approved the position previously taken by EPA in its regulations that Indian tribes alone had the requisite authority to redesignate the reservation airshed. EPA's pre-1977 regulations and tribal authority over the reservation environment were upheld in *Nance v. EPA*, 645 F.2d 701, 712-715 (9th Cir.) *cert. denied*, 454 U.S. 1081 (1981).

to Indian tribes to carry out the functions mandated by the SDWA. In addition, EPA is currently proposing that Indian tribes have primary enforcement responsibility for the sole source aquifer and wellhead protection programs. Recognizing the limited criminal authority Indian tribes exercise over non-Indians, *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978), Congress expressly provided that such lack of jurisdiction could not prevent the assumption of primary enforcement responsibility by an Indian tribe for on reservation SDWA programs. 42 U.S.C. § 300j-11 (b)(ii). Congress merely required that, in the exercise of its enforcement responsibility under the Act, an Indian tribe could not regulate in a manner less protective of human health than when a state assumes such responsibility from the EPA.

It is thus apparent that Congress strongly recognizes tribal power to regulate the reservation environment. This includes recognition of tribal regulatory authority over all lands within Indian reservations. Zoning authority is merely another means by which tribes regulate the reservation environment.

———o———

CONCLUSION

For the reasons stated above, this Court should affirm the Ninth Circuit Court of Appeal's determinations in these cases, and hold that Indian Tribes have the inherent power to zone the lands of non-Indians located within Indian reservations.

Respectfully submitted,

Bruce E. Didesch*
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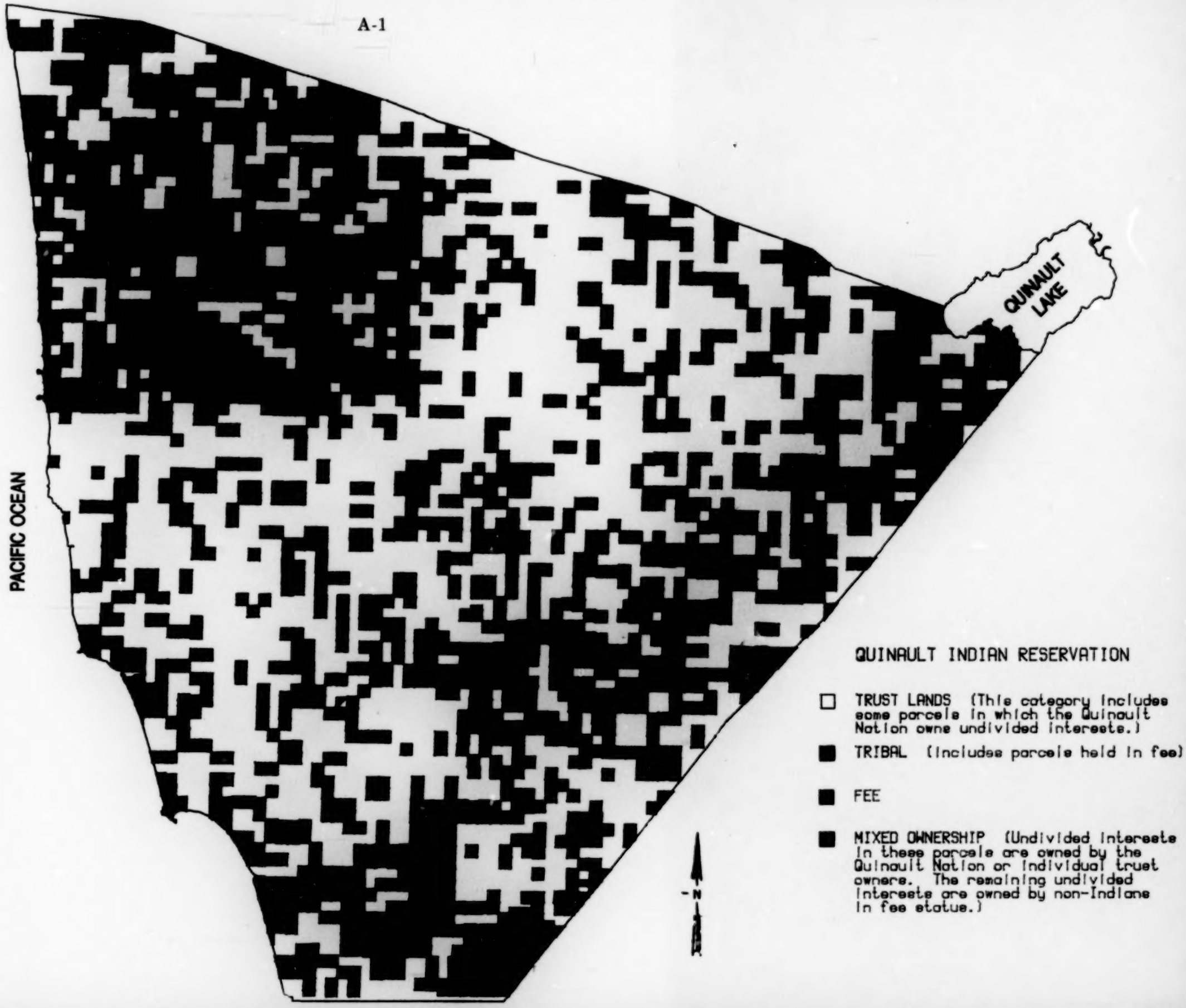
* *Counsel of Record*

APPENDIX


QUINAULT LAKE
PACIFIC OCEAN
N
QUINAULT INDIAN RESERVATION
TRUST LANDS (This category includes some parcels in which the Quinault Nation owns undivided interests.)
TRIBAL (Includes parcels held in fee)
FEE
MIXED OWNERSHIP (Undivided interests in these parcels are owned by the Quinault Nation or individual trust owners. The remaining undivided interests are owned by non-Indians in fee status.)

MICHAEL G. SPENCER
Grays Harbor County Prosecuting Attorney

P.O. Box 550 County Courthouse
Montesano, Washington 98563
(206) 249-3951
SCAN 234-5231

September 24, 1985

Tom Mark
Director of Planning & Building
Montesano, WA 98563

Dear Tom:

Recently, you asked a question regarding your department's authority to issue building permits on the Quinault Indian Reservation. It is my opinion that the Quinault Tribe has jurisdiction over fee patent lands owned by non-Indians, as well as Indian trust lands.

I base this opinion on the recent Ninth Circuit Court of Appeals case, *Cardin v. DeLaCruz,* 671 F.2d 363 (1982). In that case, the court upheld the Quinault Tribe's authority to enforce tribal building, health and safety regulations against a non-Indian on fee patent land. Because these regulations are inherent to tribal self-government, that regulatory authority is retained by them. This position was also recently affirmed in dicta in *Thomsen v. King County,* 39 Wn.App. 505 (1985)

Since the Quinault Tribe has chosen to regulate the zoning and building within the confines of their reservation, in the interest of comity, I believe we should defer to their

authority. I hope this satisfactorily answers your questions.

Very truly yours,

MICHAEL G. SPENCER
Prosecuting Attorney
for Grays Harbor County

By: /s/ Jennifer L. Wieland
JENNIFER L. WIELAND
Deputy Prosecuting Attorney

JLW/deb

JEFFERSON COUNTY
PLANNING AND BUILDING DEPARTMENT

P.O. Box 1220
Port Townsend, Washington 98368

Planning (206) 385-9140
Building (206) 385-9141

David Goldsmith, Director

October 5, 1988

Mr. Rich Wells
Director of Planning
Quinault Indian Reservation
PO Box 189
Takolah WA 98587

Re: County Authority on Indian Reservations

Dear Mr. Wells:

This letter is to verify in writing that the county does not have authority over lands within the Indian reservation with regard to land use regulations and building permits. If you have any further questions please call again.

Sincerely,

/s/ Rachel Nathanson
Rachel Nathanson
Senior Planner

RN:mkg

JOHN D. SPELLMAN
County Executive

King County Courthouse
Seattle, Washington 98104
(206) 344-4040

May 16, 1979

MEMORANDUM

TO: Department Directors

FR: John D. Spellman

SUBJECT: MUCKLESHOOT INDIAN RESERVATION

I have been asked by the Muckleshoot Indian Tribe to indicate, for all concerned, what our policy is with regard to cooperation with the Tribal Government and procedures for handling land use issues on the Reservation.

We want to cooperate with the Tribal Government on all land use planning and related issues and lend technical assistance as it further develops its policies and approaches to deal with growth and development on the Reservation. This can be mutually beneficial as certain land development actions on the Reservation can affect us and certain actions off of the Reservation can affect the Tribe.

Currently, the Building & Land Development Division refers applicants proposing land development activities on the Reservation to the Tribal Offices for processing. This should continue and apply to all land development activities. For some types of activities, such as hydraulics reviews, we may need to provide technical assistance to the Tribal Government in carrying out the proper reviews. We want to continue to have a good working relationship between King County and the Muckleshoot Indian Tribe.

Your cooperation in ensuring a successful relationship is appreciated.

/s/ John D. Spellman

JDS:ckl

INTRODUCED BY: GARY GRANT

PROPOSED NO. 88-175

February 22, 1988

Motion No. 7129

A MOTION defining intergovernmental cooperation between King County and the Muckleshoot Indian Tribe for the development of the Enumclaw Community Plan, establishing King County as the jurisdiction primarily responsible for developing the community plan and providing the Muckleshoot Indian Tribe with opportunities to advise King County during the community plan's development.

WHEREAS, the Muckleshoot Indian Tribe is a federally recognized Indian tribe, and

WHEREAS, the Muckleshoot Indian Reservation, established in 1856 by Article VI of the Medicine Creek Treaty and enlarged to its present boundary by Executive Order in 1874, is the only federally recognized Indian reservation within the area encompassed by King County, and

WHEREAS, King County refers applicants proposing land development activities on that part of unincorporated King County which is within the reservation to the Muckleshoot tribal offices for processing pursuant to an executive memorandum issued by the King County executive on May 16, 1979, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize the opportunity for and advantages of cooperating in developing the Enumclaw Community Plan because the Enumclaw planning area is under King County's jurisdiction and partially within the Muckleshoot Indian Tribe's comprehensive planning area, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental cooperation is necessary to achieve a desired consistency between the Enumclaw Community Plan, King County Comprehensive Plan and the Muckleshoot Indian Reservation Comprehensive Plan, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental planning will more likely produce a community plan which effectively manages growth and development, protects natural resources, provides public facilities and services and stimulates economic development, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental cooperation will increase the efficiency and reduce the costs of planing for the area because it will prevent duplicating the efforts of the two jurisdictions and their citizens, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that interjurisdictional planning will promote a more predictable and certain process and produce more understandable and long-lasting policies for residents, property owners, developers and other agencies and jurisdictions, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that interjurisdictional cooperation

will increase the visibility of their planning efforts, making their decision-making more understandable to the public, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that by sharing knowledge, information and resources, they will better understand each other's interests, concerns and needs in those areas in which they have a mutual interest, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental cooperation throughout the Enumclaw Community Plan's development and adoption will lay the foundation for future cooperation in land use and capital improvement project planning, development review and natural resource protection;

NOW, THEREFORE, BE IT MOVED by the Council of King County:

A. The King County parks, planning and resources department, which is responsible for developing the Enumclaw Community Plan, should seek the Muckleshoot Indian Tribe's participation in the planning process. The Muckleshoot Indian Tribe's participation may include such actions as:

1. Serving on the Technical Advisory Committee;

2. Serving on the Citizen Advisory Committee;

3. Commenting on data, land use alternatives and, finally, the Draft Enumclaw Community Plan before the plan is submitted to the King County executive or county council;

4. Commenting on proposed capital improvement projects in the draft plan before the plan is submitted to the King County executive or county council;

5. Working with King County planners to resolve differences between the two jurisdictions before the draft plan is submitted to the King County executive or county council;

6. Commenting on the King County Executive Proposed Enumclaw Community Plan's policies, land use, area zoning and capital improvement projects when the county council reviews the plan.

PASSED THIS 21st day of March, 1988.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

/s/ Gary Grant
Chairman

ATTEST:

/s/ Gerald A. Peterson
Deputy Clerk of the Council

TRANSCRIPT OF RECORD
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1903

No. 272

EDWIN T. MORRIS, EDLAR B. BLANTON, WILLIAM G. MAXWELL, PHILIP S. WITHERSPOON, ISAAC H. HARNESS, THOMAS PEERY, R. L. GLOVER, J. B. SPRAGINS, C. M. KEYES AND MILTON F. IKARD, APPELLANTS

vs.

ETHAN A. HITCHCOCK, WILLIAM A. JONES, J. GEORGE WRIGHT AND J. BLAIR SHOENFELT

Appeal from the Court of Appeals of the District of Columbia

FILED MAY 5, 1903

(18,918)

In the Court of Appeals of the
District of Columbia

Edwin T. Morris et al., Appellants,	)	
vs.	)	No. 1273.
Ethan A. Hitchcock et al.,	)	

Supreme Court of the District of Columbia.

Edwin T. Morris, Edlar B.	)	
Blanton, William G. Maxwell,	)	
Phillip S. Witherspoon, Isaac H.	)	
Harness, Thomas Peery, R. L.	)	
Glover, J. B. Spragins, C.M.	)	No. 23477.
Keyes, and Milton F. Ikard,	)	
Complainants,	)	In Equity.
vs.	)	
Ethan A. Hitchcock, William A.	)	
Jones, J. George Wright, and	)	
J. Blair Shoenfelt.	)	

United States of America,	)	
	)	ss:
District of Columbia.	)	

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill of Complaint.

Filed August 19, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Edwin T. Morris et al.,	)	Equity.
vs.	)	
Ethan A. Hitchcock et al.,	)	No. 23477.

The bill of complaint of Edwin T. Morris, Edlar B. Blanton, William G. Maxwell, Phillip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J. B. Spragins, C. M. Keyes and Milton F. Ikard, plaintiffs, against Ethan A. Hitchcock, William A. Jones, J. Geo. Wright and J. Blair Shoenfelt, defendants, complains and says:—

I. That plaintiffs and defendant—are citizens of the United States and not members of any tribe of Indians, and that plaintiffs, Morris, Blanton, Maxwell and Witherspoon are residents of Gainesville, Cooke county, Texas; that plaintiffs Peery, Glover, Harness and Ikard are residents of the town of Chickasha in the Chickasaw nation, Indian Territory; that plaintiff Spragins is a resident of the town of Ardmore in said nation and that the plaintiff Keyes is a resident of Kansas City, in the State of Missouri; and that plaintiffs sue in their own right, and for their own use and benefit, and for the use and benefit of all others owning and holding cattle and horses in said Chickasaw nation upon like terms and conditions as the plaintiffs.

II. That defendant—Hitchcock and Jones are residents of the District of Columbia, and that the defendants Wright and Shoenfelt are residents of the city of Muscogee, in the Indian Territory, but can be found in said District of Columbia; and that said defendants are officers of the United States, the defendant Hitchcock being Secretary of the Department of the Interior, the defendant Jones Commissioner of Indian Affairs, the defendant Wright Indian inspector and the defendant Shoenfelt United States Indian agent at said city of Muscogee.

III. That each of the plaintiffs is the owner of cattle and horses, and one of them owning less than five hundred head, and some of them owning exceeding one thousand head, situated and grazing upon land in said Chickasaw nation under contract with individual members of the Chickasaw tribe of Indians, which land is, and has been, held, used, and claimed by such individual Indians as their approximate share upon allotment, which cattle and horses are so held upon terms satisfactory to the individual Indians claiming such lands; the bulk of which cattle and horses were bred and raised in said nation, and have never been elsewhere, and many of them were acquired by plaintiffs by purchase from members of said tribe, but some of said cattle and horses have been introduced into said nation during the present year, and that there are now exceeding one hundred thousand cattle and horses located in said nation and owned and held by citizens of the United States, not members of said tribe, upon like terms and conditions as plaintiffs' cattle and horses are so held, which cattle and horses exceed in value the sum of fifteen dollars per head.

IV. That there is not now, and for the last four years there has not been, any public domain in said nation, but practically all of the lands in said nation have been, and are now, enclosed, claimed and occupied by individual members of said tribes as their approximate share upon allotment, and over the lands so enclosed and held the tribe is, and has been, without jurisdiction or control.

V. That the legislature for said tribe on May 3rd, 1902, enacted the pretended statute entitled "An act to prescribe privilege or permit taxes and define the manner

of their collection," thereby seeking to impose an annual tax of twenty-five cents per head upon all cattle and horses in said nation not belonging to members of the tribe, which statute is set forth in the regulations herewith filed, marked "Exhibit A" and made a part of this complaint; and thereafter, on the 3rd day of June, 1902, Honorable Thomas Ryan, acting Secretary of the Interior, wrongfully seeking to put said statute in force, promulgated in behalf of the Interior Department the regulations set forth in said exhibit; which pretended tax the plaintiff and other citizens of the United States have refused, and still refuse, to pay, because they believe the same to be illegal and unauthorized.

VI. That plaintiffs are advised and believe that said Chickasaw legislature is without dominion or jurisdiction over the person or property of plaintiffs and said other citizens of the United States, who are not members of said tribe, and is without power to enact laws controlling the action of any one except a member of the tribe, and that for the last fifty years said tribe has been without jurisdiction or power to impose taxes or burdens upon any one not a member of the tribe; and that plaintiffs and other citizens of the United States residing or holding cattle and horses in said nation are amenable to the laws of the United States enforced therein, but no other or different laws, and are entitled to all of the rights guaranteed by the Constitution of the United States, and they are therefore advised and believe that the aforesaid statute is illegal and void and a wrongful attempt upon the part of the Chickasaw Indians to usurp and exercise legislative jurisdiction and dominion over persons in no manner subject to their jurisdiction; and the plaintiffs are in like

manner advised and believe that defendant Hitchcock, as Secretary of the Interior, is but a ministerial officer, clothed with no power to legislate or to impose taxes or burdens, or to enforce the same when imposed, and that the seizure and removal of the cattle and horses of plaintiffs and other citizens of the United States without warrant or judicial investigation, or opportunity for the same, as contemplated in said regulations, is, and would be, illegal and repugnant to the fourth and fifth amendments to the Federal Constitution.

VII. That the defendants, combining and confederating, together are proceeding to enforce said statute and regulations, and are threatening to forcibly seize, hold, and drive and remove the cattle and horses of plaintiffs and said other citizens of the United States from said Chickasaw nation, thereby not only disregarding the rights of plaintiffs and said other citizens, but breaking and invading the close of the individual members of said tribe, and interfering with his use, possession and enjoyment of his approximate allotment and depriving him of his right to use the same in such a manner as in his judgment best promotes his individual interests, but the defendants wrongfully seeking justification for said statute and regulations pretend that as said cattle and horses graze upon lands in the Chickasaw nation, the plaintiffs and other citizens of the United States are under moral obligation to pay the tribe for the use of said land; but plaintiffs say this pretense is unfounded, for the payment of said pretended tax confers no right to either grass or water, and that in order to obtain grass and water for said cattle, plaintiffs and said other citizens of the United States have been forced to pay and do pay the individual Indian claim-

ant the full market value of the use and possession of said lands, and that said statute and said regulations are not attempts to obtain value for anything given or received, but are enacted and promulgated upon the erroneous assumption that the Chickasaw legislature and the Secretary of the Interior are clothed with the full power of legislation, with the right to impose such burdens as they deem fit upon those who are not members of said tribe, and to enforce them by arrest and seizure without warrant and by banishment and removal without judicial hearing or trial, or such other unrepublican and despotic methods as they may desire to employ;

VIII. That the enforcement of said statute and regulations in the manner aforesaid would not only result in a multiplicity of suits and almost endless litigation, but would injure said cattle and horses, and deprive them of water and grass and throw them upon the hands of their owners at a time when they have no means of caring for the same, or providing them with feed or pasture, thereby forcing such owners to dispose of said cattle and horses at a ruinous sacrifice and when they are not in a condition to be marketed, and when there is little or no demand therefor, and thereby plaintiffs and said other citizens of the United States similarly situated would suffer irreparable loss and damage, for which they have no adequate remedy at law.

Wherefore the plaintiffs pray that the defendants, their agents and attorneys, be restrained and enjoined from seizing, molesting or removing the cattle and horses of plaintiffs and said other citizens of the United States located in said Chickasaw nation under or by virtue of

said statute and regulations, and upon final hearing plaintiffs pray that said injunction be made perpetual, and that said statute and regulations be adjudged void, and that they may have such other and further relief as they are entitled to; to which end plaintiffs pray that process may issue requiring the defendants to appear and answer the exigencies of this bill.

RALSTON & SIDDONS,
DAVIS & GARNETT,
Attorneys for Plaintiffs.

The defendants to this bill are Ethan A. Hitchcock, William A. Jones, J. Geo. Wright and J. Blair Shoenfelt.

The State of Texas,)
County of Cooke,)

Edwin T. Morris, one of the plaintiffs, being first duly sworn, on oath deposes and says: that he has read the foregoing bill of complaint and knows the contents thereof, and that the facts therein stated upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

EDWIN T. MORRIS.

Sworn to and subscribed before me this the 16th day of August, 1902.

S. W. GLADNEY,

[SEAL.] *Notary Public for Cooke County, Texas.*

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1903.

EDWIN T. MORRIS,	)	
EDLAR B. BLANTON,	)	
WILLIAM G. MAXWELL,	)	
PHILLIP S. WITHERSPOON,	)	
ISAAC H. HARNESS,	)	
THOMAS PEERY,	)	
R. L. GLOVER,	)	
J. B. SPRAGINS,	)	
C. M. KEYS,	)	
MILTON F. IKARD,	)	
	)	No. .....
Appellants,	)	
	)	
vs.	)	
	)	
ETHAN A. HITCHCOCK,	)	
WILLIAM A. JONES,	)	
J. GEORGE WRIGHT,	)	
J. BLAIR SHOENFELT,	)	
	)	
Appellees.	)	

Appeal from the Court of Appeals for the
District of Columbia.

BRIEF FOR APPELLANTS.

STATEMENT.

On May 3rd, 1902, there was enacted by the Legislature for the Chickasaw Tribe of Indians a Statute entitled "An act to prescribe privilege or permit taxes and defining the manner of their collection." The act, in substance, provides that upon all live stock held in the Chickasaw Nation by non-citizens, there should be paid annually a tax of twenty-five cents per head on cattle, horses and mules and five cents per head on sheep and goats, payable to such person or persons and collected under such rules and regulations as may be prescribed by the Secretary of the Interior, the expense to be deducted from the gross collections and the net balance paid quarterly to the Treasurer of the Chickasaw Nation. If the taxes are not paid when demanded, such live stock to be in the Chickasaw Nation without its consent and unlawfully upon the lands of the Chickasaws, and the presence of such stock and their owners or holders deemed detrimental to the peace and welfare of the Indians. This Statute was approved by the President on May 15th, 1902. The Honorable Thomas Ryan, acting Secretary of the Interior, on June 3rd, 1902, promulgated certain regulations for the enforcement of the above statute. These regulations, in substance, re-enact the statute and provide that the tax shall apply to all live stock held by any person other than a recognized citizen of the tribe; that the taxes should be paid to the Indian Agent at Muskogee annually on the 1st day of January prior to the introduction of such stock, and that the regulations and taxes should apply to all stock held within the limits of the Chickasaw Nation by other than recognized members of the tribe,

whether held upon the public domain or upon lands leased from individual Indians.

The appellants are citizens of the United States having cattle and horses within the Chickasaw Nation upon lands leased from individual Indians and held by them as their approximate shares upon allotment. The bulk of the cattle so owned by them were bred in the Chickasaw Nation and many of them acquired by purchase from members of the tribe, and none of such cattle were introduced into the Nation subsequent to January 1st, 1902.

The complaint was filed in the Supreme Court for the District of Columbia on August 19th, 1902, by the appellants sueing in their own behalf and in behalf of all owners of livestock similarly situated to enjoin the Secretary of the Interior, the Commissioner of Indian Affairs, the United States Indian Inspector and the United States Indian Agent at Muskogee from seizing and removing the cattle and horses of the appellants and other owners of live stock from the limits of the Chickasaw Nation for the non-payment of said taxes. In the complaint the validity of the Chickasaw Statute, the regulations of the Interior Department and the seizure and removal of said cattle were called in question upon the grounds hereinafter assigned. The defendants appeared and demurred to the complaint upon the following grounds:

1st. The court has no jurisdiction over the subject matter of the suit.

2nd. There is a fatal defect of parties to the bill in that the Chickasaw Nation or tribe, nor any member or representative thereof, is not made a party thereto.

3rd. The bill of complaint is bad in substance and does not state facts sufficient to entitle the complainants, or either of them, to the relief prayed for or to any relief.

The court overruled the first and second demurrers, but sustained the third and dismissed the bill. In sustaining the demurrer, the court held in substance that said Statute and regulations were valid and the threatened seizure and removal of the cattle a lawful exercise of authority upon the part of the Secretary of the Interior, but held that the bill was sufficient to entitle the plaintiffs to an injunction provided the threatened seizure and expulsion were unlawful. The case was appealed to the Court of Appeals for the District of Columbia, and was there affirmed in a written opinion substantially sustaining the opinion of the trial court; and the case has been appealed to this court.

ASSIGNMENT OF ERROR.

The appellants claim that the Court of Appeals for the District of Columbia in affirming said judgment committed error as follows:—

1st. In holding the Chickasaw Statute of May 3rd, 1902, to be valid, when the same should have been held invalid and void, because an encroachment upon the exclusive power of Congress under the Constitution to regulate commerce with the tribe.

2nd. In holding the Chickasaw Statute of May 3rd, 1902, to be valid, when the same should have been held invalid and void, as being a wrongful attempt upon the part of the Chickasaw Legislature to usurp legislative dominion and jurisdiction over the persons and property of citizens of the United States not members of the tribe, which jurisdiction the tribe does not, and never did, possess.

3rd. In holding the regulations promulgated by the Honorable Thomas Ryan on June 3rd, 1902, in behalf of the Interior Department, to be valid, when the same should have been held to be invalid and void, as a wrongful attempt upon the part of an executive officer to usurp power of legislation vested alone in Congress.

4th. In holding said Chickasaw Statute of May 3rd, 1902, and said regulations of June 3rd, 1902, as valid, when the same should have been held invalid and void, because repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

5th. In holding that the provisions of the Treaties of 1855 and 1866 with the Choctaw and Chickasaw Indians in reference to intruders are still in force, and not superseded or abrogated by the Atoka Agreement and the Curtis Bill and other subsequent legislation inconsistent therewith conferring upon citizens of the United States, not members of the Chickasaw Tribe, the right to reside and hold property in the Chickasaw Nation.

6th. In holding that Sections 2147 and 2149 of the Revised Statutes are still in force and applicable to conditions existing in the Chickasaw Nation.

7th. In holding that Sections 2147 and 2149 of the Revised Statutes are valid, when the same should have been held to be invalid, and repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

8th. In holding that said regulations of June 3rd, 1902, are not inconsistent with Section 2117 of the Revised Statutes, in which Congress expressed its will upon the subject, and prescribed the procedure.

9th. In holding that the Secretary of the Interior, an executive officer of the United States deriving all of his authority under its laws, has the right or power as such to enforce the Chickasaw Statute of May 3rd, 1902.

10th. In not holding that the Act of Congress knows as the Curtis Bill and the Atoka Agreement took from the tribe the control of the agricultural and grazing lands and conferred upon the individual Indian the right to the

possession, use and enjoyment of his approximate share free from interference of the tribe in like manner as it took from the tribe the control of the mineral lands and placed them under the exclusive control of the Secretary of the Interior.

* * *

"The power to tax," says Mr. Cooley in his Principles of Constitutional Law, "is an incident of sovereignty and is co-extensive with the subjects to which that sovereignty extends." The power to tax, it is conceded, arises from the duty of protection; and the right of taxation and the duty of protection go hand in hand.

It is claimed that this tax is needed to maintain the tribal government and the Indian schools. None but Indians are subject to the tribal government, and none but Indian children can attend the schools. The so-called government and schools are maintained for the exclusive benefit of Indians. Those who enjoy the benefits of government should bear the burdens.

The Court of Appeals, without apparently intending to be sarcastic, speaks of non-citizens and their property being within the limits of the tribal government, enjoying its benefits and protection. It is not possible to point to the protection or benefit the non-citizen receives directly or indirectly from the tribal government. If it should be deemed necessary to tax the five hundred thousand white inhabitants of the Indian Territory to maintain tribal governments and schools, who should be the judge of the necessity for this tax and the amount of the same? What government has the power to impose burdens and restrictions and to regulate the conduct of white citizens of the United States in the Indian Territory? To what government do these citizens owe allegiance and duty?

To what laws are they amenable? If these citizens are to be taxed, not for their own benefit, but for the benefit of others, what power should prescribe the tax? Can it be said that these tribal governments can impose whatever burdens they deem fit upon men and their property, not belonging to the tribe; and that the Secretary of the Interior can coerce payment by whatever arbitrary methods he may be pleased to adopt? If these things can be done, there certainly exist remarkable conditions in the Indian Territory. If this tax be lawful, it is surrounded with none of the usual safe-guards. Those who impose the burden do not carry any part of it, and those who pay the tax receive no benefit. It is not a tax but spoliation.

See Arnd vs. Union Pac. R. R. Co., 120 Fed. 915.

But it is said the cattle and horses are upon the tribal lands without the consent of the tribe, and that this is an intrusion which the United States, under the provisions of the treaties, Supra, is under obligation to prevent.

Be this as it may. It is the province of Congress to enact laws and provide means for fulfilling the treaty obligations of the government. It is not for the Secretary of the Interior to say what is or is not an intrusion, and to abate it by any means he may see proper to adopt. Congress has enacted the laws, necessary in its judgment, to fulfill the treaty obligations. If the laws be deemed inadequate, an appeal should be made to Congress for additional legislation.

Under Section 2117 of the Revised Statutes, any person who drives or in any wise conveys any stock

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brought within the jurisdiction of the court. The issue did not call for any serious consideration of Sections 2147 and 2149. If the agent acted in good faith, the removal was not fraudulent, though it may have been wrongful. The Court of Appeals seems to think that as the Statutes of Arkansas were subsequently put in force in the Indian Territory, the former decisions of the Supreme Court of Arkansas construing United States, not Arkansas Statutes, are entitled to peculiar weight. We do not think the premises justify the conclusion.

In order to understand just how well the Arkansas Supreme Court understood conditions in the Indian Territory, Carter vs. Good, 50 Ark. 719, should not be overlooked. There, while two citizens of Arkansas were journeying through the Indian Territory, one of them wrongfully appropriated the other's horse. After their return home, the owner sued the wrong-doer for the value of the horse. The Supreme Court held that he had no cause of action because the conversion took place in the Indian Territory.

The act of June 30, 1834, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers and the provisions of the treaties of 1855 and 1866 with the Choctaw and Chickasaw Indians relative to intruders, are not now in force in the Chickasaw Nation, or applicable to conditions existing there; but have been repealed by subsequent and inconsistent legislation.

So far we have treated the question as though the Act of June 30th, 1934, and the Treaties of 1855 and 1866 were in force. There are now within the Chickasaw Nation probably one hundred and fifty thousand white inhabitants

and probably eight thousand persons claiming to be Indians, but half of them are of mixed blood, or what are known as 'intermarried citizens.' There are many towns and cities in the Chickasaw Nation incorporated under the laws of the United States in which under the 14th Section of the Curtis Bill all of the inhabitants, without regard to race, are entitled to equal rights, privileges and protection. The Indians are citizens of the United States and qualified jurors in the federal courts, and compete with their white fellow citizens for the various federal offices. Practical partition has been made of the surface of the land. Each Indian is entitled to the use of his approximate share, with the right to lease it to whom he pleases, including white men. The inhabitants of the Chickasaw Nation, none of whom may be Indian, may incorporate for operating and maintaining therein electric roads, telephone and telegraph lines, bridges, turn-pikes, mining and manufacturing enterprises, banking, and the various other purposes for which it is usual to incorporate. 31 S. at L. 795, Sec. 8. Corporations chartered by other states may transact business in the Chickasaw Nation upon filing a power of attorney of South McAlester creating an agent with power to accept service. Members of the tribe are merchants and carry large stocks of clothing, hardware and other merchandise. The Indians and whites mingle in daily intercourse, and traffic and trade as in other sections of the Union. The civil and criminal laws of the State of Arkansas have been put in force in the Chicasaw Nation, and all inhabitants, including Indians, are subject thereto. The tribal government has been stripped of about all of its power, even over the members of the tribe, and is merely continued in existence for the

purpose of perfecting the allotment of lands. In most matters the United States deals directly with the individual Indian, and not with the so-called government. These are certainly conditions not contemplated by the Act of June 30th, 1834, or by the Treaties of 1855 and 1866.

In United States vs. Cisna, 1st McLean 254, it was held that the Act of June 30th, 1834, was intended to apply to a country inhabited almost exclusively by Indians, where there was but little, if any, intercourse by the Indians with white people; and of necessity could not, and did not apply in a country having a considerable white population, and in which the Indians and whites mingled, traded and trafficked in daily intercourse.

It must be conceded that a foreigner can not be prosecuted for travelling through the Chickasaw Nation without a passport, and that the owner of cattle does not commit a felony in shipping his property to the market. It must be conceded that a white man in the Chickasaw Nation may lawfully buy clothing, hardware, stoves and cooking utensils from an Indian merchant. If he should refuse to pay for them when bought, he could not avoid the debt by pleading that the purchase was in violation of law or against public policy. The defendants must concede this much. Yet, it is contended that in the incorporated cities of the Chickasaw Nation where the Constitution is in force and courts are sitting with jurisdiction to redress all grievances, the Indian office can extort money by threatening to kidnap a citizen, and can arbitrarily invade the home of a citizen, close his place of business and practically confiscate his property. This is more absurd than the prosecution of a foreigner for travelling without a passport. It is contended that the Indian office can lawfully

issue an order to a lieutenant of Indian police directing him to remove from the Chickasaw Nation all cattle held there in violation of the Act of May 3, 1902, specifying no particular cattle or the name of any owner, but leaving all these things to the discretion of the policeman. Now it is seriously contended that this is due process of law. It is also contended that the Interior Department can go into court and have the clerk enjoined from filing complaints in replevin, or issuing writs, and the marshal enjoined from executing the same; thus preventing the citizens from obtaining any relief against the threatened depredation of the policeman. Now it is claimed that the forced contribution of money by this method is due process of law. Justification for these acts can not be found in the right of Congress to regulate commerce with the Indian tribes. The Interior Department is not Congress. In regulating commerce with the Indian tribes, Congress must of necessity observe the other provisions of the Constitution. The same sentence confers upon Congress the right to regulate commerce with the several states, but in doing so, no man can be compelled in a criminal case to furnish evidence against himself in violation of another provision of the same instrument. Councilman vs. Hitchcock, 142 U. S. 547.

The same section confers upon Congress the right to exercise exclusive legislation in all cases whatsoever over the District of Columbia, but in so doing the other provision must be observed, and no one can be deprived of the right of a trial by jury in an action at law. Callan vs. Wilson, 127 U. S. 540. The same section confers upon Congress the right to lay and collect duties, imposts and excises, but in doing so Congress can not

violate other provisions and require the defendant to furnish evidence against himself in an action to recover a penalty. Boyd vs. United States, 116 U. S. 610.

Sections 2147 and 2149 were evidently enacted upon the theory that the Constitution of the United States was not in force in what was meant by the term "Indian country." It was a wild, unsettled country beyond the outposts of civilization, to which the judicial arm of the government had never extended, and in which there was nothing to indicate the authority of the United States except here and there a military post. There were no courts in the country or civil officers, and it was impossible to give practical effect to the constitutional guaranties. Certainly it can not be successfully contended that in reference to all matters which Congress is authorized to do, the citizen can be arrested without warrant and transported and banished without hearing, and his property seized, damaged and removed at the pleasure of an executive officer.

It is the contention of the defendants that the Commissioner of Indian Affairs can, without hearing, send a policeman to seize and remove from the Indian Territory a reputable white citizen, and that the effect of this exparte proceeding is to deprive him of the right to ever return to the Indian Territory, and to subject him to a penalty of one thousand dollars of he is ever found therein. They have arrested and removed, and thereafter sought to prosecute the mayors and aldermen of incorporated towns and the owners of town lots and other real estate. This, it is claimed, is due process of law.

It ought to be reasonably free from doubt that the provisions of the Treaties of 1855 and 1866 in reference to

intruders have been repealed by subsequent and inconsistent legislation.

Ward vs. Race Horse, 163 U. S. 511.

The Cherokee Tobacco, 11 Wallace 616.

The policy as manifested by the Treaties of 1855 and 1866 was to prevent strife between the white man and the Indian by forcing them to live separate and apart. It was not contemplated that the Indian Territory should ever be incorporated into any state. It was unlawful for any white man to live in the Indian Territory, unless he was an officer or employee of the government, or came under some of the specified exceptions.

The policy of the government has since, from necessity, undergone a radical change. It is not now the policy of Congress to exclude white men from the Indian Territory; but it is the manifest policy of the government to admit the territory into the Union as a state at no distant day.

This policy is wholly inconsistent with the policy manifested by the old treaties. The Curtis Bill and the Atoka Agreement expressly provide for white people residing in the Chickasaw Nation. They are permitted to buy and to own land, to incorporate towns, maintain municipal government, to levy taxes and to maintain public schools. Throughout the Curtis Bill and the Atoka Agreement white men are recognized as being lawfully in the Chickasaw Nation. If the consent of the Indians be necessary, that consent is given in the Atoka Agreement. If the Chickasaw Legislature should demand that the incorporated cities be abolished and the white inhabitants ban-

ished, would the government be under any treaty obligation to do so? There is nothing more absurd than the contention that all white men in the Chickasaw Nation, except government employees, are intruders, and must year by year obtain the consent of the Indians to their being there.

(SEAL)

Attorney General, State of Oregon

DEPARTMENT OF JUSTICE
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February 10, 1983

No. 8138

This opinion is issued in response to a request from the Honorable Bob Harper, State Representative.

FIRST QUESTION PRESENTED

Do the Confederated Tribes of Umatilla County have power to enact a land use code for the reservation which would supersede all state and county regutions as they apply to Indians and non-Indians alike?

ANSWER GIVEN

Under the facts presented to us it is probable that the Confederated Tribes' retained sovereignty includes the exclusive right to promulgate and apply a land use code to all lands within the "diminished reservation." For Indian trust lands outside the diminished reservation, but within original treaty boundaries, the tribes retain exclusive authority to apply a land use code to such lands. With respect to non-Indian fee lands outside the diminished reservation but within the original 1855 treaty boundaries, the answer depends upon factual circumstances as they bear upon the Confederated Tribes' sovereign interest in protecting their political integrity, their economic security and their health or welfare.

SECOND QUESTION PRESENTED

Will the constitutional rights of non-Indians who either reside in the area or own property in the area be violated because they are not proportionately represented in developing such a land use code?

ANSWER GIVEN

No.

DISCUSSION

INTRODUCTION

The issue raised by this opinion request is the power of the Confederated Tribes of the Umatilla Indian Reservation (Confederated Tribes) to adopt and apply land use regulations to non-Indian fee lands within the reservation. Before addressing this question directly we first examine some history and the physical status of the reservation.

In 1855 the Cayuse, Umatilla and Walla Walla Indians entered into a treaty with the United States. Under this treaty the Indians ceded all their right, title and claim to every part of the country claimed by them to the United States. As part of the treaty, the United States set apart and marked for the exclusive use of the Indians a portion of the land so ceded as an Indian reservation. The treaty was ratified by the President on April 11, 1859. 12 Stat. 945.

Thereafter, under the Act of March 3, 1885, 23 Stat. 340, the United States authorized the allotment of certain agricultural lands to the Indians residing upon the Umatilla reservation. It was further provided in that Act that before any allotment would be made, a commission of three disinterested persons appointed by the President would go upon the reservation, take a census of the In-

dians who would remain on the reservation and be entitled to take lands in severalty thereon and determine and set apart for the Indians the amount of lands required to make the necessary allotments. Certain other lands were also to be set apart for an industrial farm and school. The commission was to file a report with the Secretary of Interior indicating the number and classes of persons entitled to allotments and describing the tract selected for them. If the Secretary approved the report, "the said tract shall thereafter constitute the reservation for said Indians." 23 Stat. 341. It was also provided that the residue of the original reservation not included within the new boundaries would be sold, with the net proceeds after expenses and reimbursement of individual Indians for Indian-owned improvements placed in the treasury to the credit of the Indians.

Thereafter, such a commission was appointed on August 13, 1887 and selected a tract for a reservation containing in the aggregate 119,364 acres. The Indians, however, were not happy with the tract selected. Accordingly, the Act providing for the allotment of agricultural lands to the Indians (23 Stat. 341) was amended to provide for as much additional lands in the reservation selected as would enable the Secretary "to fix, define, and establish the metes and bounds of said reservation tract in a satisfactory manner," and to include therein such portions "as he may deem advisable of certain lands in the eastern part of the reservation" and "to establish such diminished reservation accordingly . . . ." 25 Stat 559-560.

Thereafter, by Executive Order approved October 17, 1888, the Secretary of Interior, pursuant to the aforesaid Acts

"ordered that so much of the existing Umatilla Indian Reservation in the State of Oregon, as lies within the following-described metes and bounds, *is hereby declared to be, and is, established as the diminished reservation required by the act of March 3, 1885,* as amended by the act of October 17, 1888, to be selected and set apart to constitute the reservation for the confederated bands of Cayuse, Walla Walla, and Umatilla Indians for the purposes specified in the said act of March 3, 1885 . . . ." I Kappler, *Indian Affairs, Laws and Treaties,* p 893 (2d ed 1904). (Emphasis added.)

Thereafter, pursuant to the Allotment Act of 1887, 24 Stat 388, the Secretary of the Interior allotted lands within the reservation in trust to the Confederated Tribes and to individual Indians. All of the allotted lands which the Confederated Tribes or individual Indians continue to occupy are held in trust by the United States for the Indians. These lands are referred to in this opinion as Indian Trust Lands.

Under the same Act, the Secretary of Interior also issued fee patents to lands within the reservation to non-Indians. In addition, some Indians within the reservation leased or deeded their lands to non-Indians. Thus, approximately 55 percent of the reservation land is currently held by non-Indians. These non-Indian lands within the reservation are referred to in this opinion as non-Indian fee lands. (FN1)

Throughout the diminished reservation non-Indian fee lands are closely interspersed with Indian Trust Lands. Outside the diminished reservation within the original treaty boundaries, there are some Indian Trust Lands and

large amounts of non-Indian fee lands isolated from the Indian Trust Lands.

In 1973, the Confederated Tribes adopted an interim zoning ordinance applying to all lands within the diminished reservation. (FN2) This was followed by a comprehensive plan in 1979.

By agreement between the county and the Tribes the Tribes' land use regulations are applied to all lands within the diminished reservation, both Indian and non-Indian alike. In the case of routine permits involving non-Indian fee lands, the Indian Development Office acts as the agent for the county for processing the permits. For discretionary permits such as conditional use permits, the Tribes through their Board of Trustees hear applications for permits applicable to Indian Trust Lands and the county through its hearings officer acting as an extension of the county planning commission hears applications involving non-Indian fee lands.

The Confederated Tribes have proposed a land use code (a zoning ordinance) which would supersede the existing interim zoning ordinance and all state and county land use regulations for the area. The code has not yet been adopted and will not be adopted until the Confederated Tribes schedule and complete several more hearings concerning the code. As directed the code would apply to all lands within the original 1855 treaty boundaries. (FN3)

The issue we deal with first is the power of the Confederated Tribes to adopt a land use code applicable to all lands within the diminished reservation.

FIRST QUESTION PRESENTED

Power of the Confederated Tribes of Umatilla County to Adopt a Land Use Code

Before the coming of the Europeans, the Indian tribes were self-governing political communities. "Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *United States v. Wheeler,* 435 US 313, 322-323 (1978). However, the Indian tribes no longer have the full attributes of sovereignty.

> "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." *United States v. Wheeler, supra,* 435 US. at 323. (Footnote reference omitted.)

This quotation refers in part to an implicit divestiture of sovereignty. On this the Court said:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. . . . They cannot enter into direct commercial or governmental relations with foreign nations. . . . And, as we have recently held, they cannot try nonmembers in tribal courts. . . .
>
> "These limitations rest on the fact that *the dependent status of Indian tribes* within our territorial jurisdiction *is necessarily inconsistent with their freedom independently to determine their exter-*

nal relations." United States v. Wheeler, supra, 435 US at 326. (Emphasis added; citations omitted.)

Nevertheless the Court found a limited retained sovereignty within Indian tribes with respect to matters involving their own self-government, saying:

> "But our cases recognize that the Indian tribes have not given up their full sovereignty. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler, supra,* 413 US at 323.

And in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 US 134 (1980), the Court in upholding the power of Indian tribes to impose cigarette taxes upon the on-reservation sale of cigarettes to nontribal purchasers, said:

> "Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. [Citation omitted.] In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must

> be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Reservation, supra,* 447 US at 153-154.

And *see also Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) upholding the inherent power of an Indian tribe to impose a severance tax on oil and gas extracted and removed from tribal reservation lands by non-Indian lessees.

In *Montana v. United States,* 450 US 544 (1981), the Court quoted *United States v. Wheeler, supra,* with approval and recognized a limited retained tribal sovereignty saying:

> "Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana v. United States, supra,* 450 US at 564.

The court, however, was careful to point out the limits of this power, saying:

> "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delagations." 450 US at 564.

The Court then amplified on the distinction between areas within and without tribal control saying:

> "The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, rejecting a tribal claim of inherent covereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot

exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, 6 Cranch 87, 147—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.' 435 U.S., at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition *that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.* A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] *A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.*" *Montana v. United States, supra,* 450 US at 565-566. (Emphasis added.) (Footnote references omitted.)

These cases establish the principles that (1) the Indian tribes still possess those attributes of sovereignty not withdrawn by treaty, statuts, or by implication as a necessary result of their dependent status, (2) this retained sovereignty generally gives the Indians the right to control their internal relations among themselves; how,-ever (3) that retained sovereignty includes the inherent power to exercise civil authority over the conduct of non-Indians on non-Indian fee lands within the reservation

only when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.

These principles were applied in the case of *Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, Wyoming,* 670 F2d 900 (10th Cir 1982). In that case the issue was the validity of a tribal zoning ordinance adopted by the Shoshone and Arapahoe Indian Tribes and affecting fee lands owned by non-Indians and located within the Indian reservation. The district court ordered a partial summary judgment and a preliminary injunction requiring compliance with the zoning ordinance.

As in the instant situation the reservation consisted of land held in trust for the tribes and individual Indians and land owned by non-Indians. The appellants Knight, who were non-Indians, had prepared plats for a 32-lot subdivision within the reservation known as Big Wind Ranchettes No. 1 and a 100-lot subdivision to be called Big Wind Ranchettes No. 2. The Knights obtained local planning commission approval and proceeded to plat, subdivide and sell lots until the Indians brought their injunction suits. The court first dealt with the issue of the power of the tribes to control the use of fee lands by non-Indians:

> "The Developers argue that the Tribes have no authority to control the use of fee lands by non-Indians without a delegation by Congress of such power. We disagree. Indian Tribes have 'attributes of sovereignty over both their members and their territory.' *Merrion v. Jicarilla Apache Tribe,* — U.S. —, —, 102 S.Ct. 894, 903, 71 L.Ed.2d 21, 42 CCH S.Ct.

p. 1121, 1129, citing *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 718, 42 L.Ed.2d 706. Included in the Tribal power is 'a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.' *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152-153, 100 S.Ct. 2069, 2080-81, 65 L.Ed2d 10. Civil jurisdiction is distinguishable from the criminal jurisdiction over non-Indians which was denied in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 212, 98 S.Ct. 1011, 1022, 55 L.Ed.2d 209." *Knight v. Shoshone & Arapahoe Indian Tribes, supra,* 670 F2d at 902.

The court then considered whether a treaty or Congress had attempted to deal with this issue of the Indians' power, saying:

"In the situation presented no treaty provision is of any pertinence and Congress has not acted to delegate or deny the right to control use of non-Indian owned land located within the reservation. Denial of the right does not arise by implication as a necessary result of their [the Tribes] dependent status. See *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303; *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 1258, 67 L.Ed2d 1245, recognizes that: 'Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdictio nover non-Indians on their reservations, even on non-Indian fee lands.' *One proper form of the exercise of that power may be in response to 'conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'* Id." *Knight v. Shoshone & Arapahoe Indian Tribes, supra,* 670 F2d at 902. (Emphasis added.)

The court noted that there was an absence of any land use control over lands within the reservation and that the interest of the tribes in preserving and protecting their homeland from exploitation justified the zoning code, saying:

> "The executive branch expressly advised the Tribes that the ordinance could be enacted without BIA approval. Similarly, in 1900 the United States Attorney General advised the Secretary of Interior that certain tribes there considered could 'prescribe the terms . . . upon which they will permit outsiders to reside or carry on business in their territory.' 23 Op. Atty. Gen. 214, 216 (1900). See also opinion of Solicitor of the U.S. Interior Department quoted in *Merrion v. Jicarilla Apache Tribe,* — U.S. at —, n. 12, 102 S.Ct. at 906, n. 12, 42 CCH S.Ct. Bull., p. 1134 n. 12. The power to control use of non-Indian owned land located within the reservation flows from the inherent sovereign rights of self-government and territorial management. See *Merrion v. Jicarilla,* Id. — U.S. at —, —, 102 S.Ct. at 894, 901, at pp. 1121, 1125. The express positions of the executive and judicial branches and the implication fairly to be drawn from the lack of delegation or denial of this power by Congress, support the conclusion that the Tribes had the power to enact the zoning ordinance in question." *Knight v. Shoshone & Arapahoe Indian Tribes, supra,* 670 F2d at 903.

The court, however, appeared to retain jurisdiction for the future as to any attacks that might be made on the application and enforcement of the tribal zoning ordinance. 670 F2d at 904.

In a somewhat similar situation, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen,* 665 F2d 951 (9th Cir 1982), *cert den*

103 S.Ct. 314 (1982), Indian tribes attempted to regulate the manner in which non-Indians who owned land on the reservation bordering Flathead Lake, a navigable lake, exercised their riparian rights. The tribes claimed beneficial title to a portion of the lake and sought to enforce an ordinance they had enacted in 1977 to regulate both existing and future structures on the bed and banks of the sourt half of Flathead Lake.

The court held that the bed of the south half of Flathead Lake was owned by the United States in trust for the tribes and that the tribes had the power to regulate the federal common law riparian rights of non-Indians owning reservation land bordering the area:

> "Even if the *Montana rule*—divestiture of all powers not necessary 'to protect tribal self-government or to control internal relations'—is applied to the instant case, we belive that the Tribes should prevail on the regulatory issue. We reach this conclusion for two distinct reasons.
>
> "First, the *Montana* Court explicitly affirmed this circuit's holding that the Crow Tribe had the power to 'prohibit non-members from hunting or fishing on land belonging to the Tribe *or held by the United States in trust for the Tribe,*' or to regulate such hunting and fishing if it permitted those activities. 101 S.Ct. at 1254 (emphasis added). In the instant case, the Tribes are in effect seeking to regulate non-Indians' use of tribal trust land, since the exercise by appellees of their riparian rights entails building wharves, breakwaters, and other structures out onto the bed and banks of the south half of Flathead Lake.
>
> "Second, the *Montana Court* acknowledged certain exceptions to the general rule that tribes were divested of powers not necessary for self-government or internal relations. In particular, '[a] tribe may

> also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.' 101 S.Ct. at 1258. *The conduct that the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes.* Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources. *Hence the challenged ordinance falls squarely with the exception recognized in Montana.* [Footnote omitted.]" *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen, supra,* 665 F2d at 964. (Emphasis added.)

Both the *Knight* and *Namen* cases are significant because they apply the *Montana* principle of acknowledging the inherent power of a tribe to regulate non-Indian conduct on non-Indian fee lands within the reservation where such conduct has a direct effect on the political integrity, economic necessity or the health or welfare of the tribe.

In *Cardin v. De La Cruz,* 671 F2d 363 (9th Cir. 1982). *cert den* 103 S Ct 293 (1982), the court considered whether an Indian tribe could enforce its tribal code against a non-Idian owner of a grocery store which had dangerous and unsanitary conditions that violated tribal buildings, health and safety regulations. The court, citing *Montana, supra,* sustained the right of the tribe to impose its building, health and safety regulations on the grocery store because of the commercial relationships between the tribe and the store owner and because the

> "conduct that the Tribe is regulating 'threatens or has some direct effect on . . . the health or welfare of the [T]ribe.'" *Cardin v. De La Cruz, supra,* 671 F2d at 366.

In the context of these recent cases, we note the court's holding in *United States v. Montana, supra,* that the Indian tribes did not have authority to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe. In reaching that holding the Court said:

> "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. [Citations omitted.] Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05." *Montana v. United States, supra,* 450 US at 564-565. (Footnote reference omitted.)

One of the reasons for this holding, perhaps, was the fact that the Crow tribe was "a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." 450 US at 556. Other reasons were that the State of Montana had traditionally exercised near exclusive jurisdiction over hunting and fishing on non-Indian fee lands within the reservation, and the United States and the Indians had accommodated themselves to the state regulation; additionally, there was no indication that the state had abdicated or abused its regulatory responsibility so as to imperil the subsistence or welfare of

the tribe. *Montana v. United States, supra,* 450 US at 564 (n 13) and 566 (n 16 and text).

However, we note again the exception under which an Indian tribe does retain its inherent sovereign power

> "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]" *Montana v. United States, supra,* 450 U.S. at 566.

In the instant situation there are some differences from the *Montana* situation. For one, there is a recent history of agreement between the Tribes and the county under which the Tribes' land use regulations have been applied to both Indian Trust Lands and non-Indian fee lands within the diminished reservation. Thus unlike the *Montana* case, there is a recent history of Indian land use regulations applying to non-Indian fee lands within the reservation.

Secondly, and perhaps more importantly, in the portion of the reservation known as the diminished reservation, Indian and non-Indian ownerships are so thickly and closely interspersed that it is difficult to conceive how, as a practical matter, two distinct systems of land use regulation could effectively operate without serious and damaging conflicts.

This raises the issue as to what authority, if any, the county has to impose its land use regulations within the reservation.

Initially, the United States Supreme Court viewed an Indian reservation as a distinct nation within the laws of

the state would have no force and effect. *Worcester v. Georgia,* 31 U.S. [6 Pet.] 515, 561 (1832). But the court has moved away from this doctrine. In *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), the Court said:

> "Although '[g]eneralizations on this subject have become . . . treacherous,' *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973), our decisions establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government. Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries, [citations omitted]. At the same time we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.' [Citations omitted.] *As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.* The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 173 (1973), quoting *United States v. Kagama,* 118 U.S. 375, 381-382 (1886)." 448 U.S. at 141-142. (Emphasis added.) (Footnote reference omitted.)

The Court went on to note that there were two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members saying:

"Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, [sec] 8, cl. 3. [Citation omitted.] This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. [Citations omitted.] Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' [Citations omitted.] The two barriers are independent because either, standing alone, can be sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' *McClanahan v. Arizona State Tax Comm'n, supra,* at 172, against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 142-143.

Thus, the court now analyzes the question of state law applicability within an Indian reservation in terms of federal preemption of state law or unlawful infringement by state law on the right of reservation Indians to make their own laws.

In this context the courts have not permitted local land use codes to be applied to Indian trust lands. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. den.* 429 U.S. 1038 (1977); *United States v. County of Humboldt,* 615 F.2d 1260 (9th Cir. 1980). The courts have also construed the provisions of Public

Law 280, 28 U.S.C. sec. 1360, (FN4) as not intended to grant general civil regulatory control over Indians within the reservation. *Bryan v. Itasca County,* 426 U.S. 373, 385, 390 (1976). (FN5)

Thus, as to Indian trust land within or without the diminished reservation, it is clear that the county has no authority to apply its land use regulations to such lands.

As to non-Indian lands within the diminished reservation, an analysis of whether the state or the county can regulate such lands within the reservation must focus on analysis of the issues of whether state (or county) authority has been preempted by federal law or whether state law would unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 142-143. The court applied this kind of analysis in *Crow Tribe of Indians v. State of Montana,* 650 F.2d 1104 (9th Cir. 1981), *opinion amended,* 665 F.2d 1390 (1982). That case was a suit for injunctive and declaratory relief by the Crow Indians against the State of Montana to enjoin the imposition by the state of revenue and gross receipts taxes upon coal mined from reservation lands by non-Indian lessees and from deposits held in trust for the Indians in lands outside the reservation. The Indians had imposed their own severance tax on coal mined within the reservation.

In determining that the Indians' complaint stated a cause of action, the court declared:

> "No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy. [Footnote omitted.] On the

> other hand, legitimate interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on 'a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.' *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 149, 100 S.Ct. at 2586." *Crow Tribe on Indians v. State of Montana, supra,* 650 F.2d at 1109.

The court concluded that the tribe had made sufficient allegations to raise the possibility that the estate tax had been preempted by the Mineral Leasing Act of 1938, 25 U.S.C. secs. 396a-396g and the regulations promulgated thereunder, 25 C.F.R. sec. 171.1-.30 (1980).

The court then applied the self-government doctrine saying:

> "The accommodation of state and tribal interests is also central to the analysis of whether a state law infringes upon the right of reservation Indians to 'make their own laws and be ruled by them.' [Citation omitted.] The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, [citation omitted] vehicle registration, [citation omitted] or the exercise of general civil jurisdiction over the members of the tribe, [citations omitted]. At base, however, the right of tribal self-government is a federal policy established by and subject to the will of Congress. Although self-government is related to federal preemption in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation." *Crow Tribe of Indians c. State of Montana, supra,* 650 F.2d at 1109-1110.

On this point the court concluded that the tribe's complaint stated a claim

> 'that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable." *Crow Tribe of Indians v. State of Montana, supra,* 650 F.2d at 1117.

See also, Cohen, *Handbook of Federal Indian Law,* pp 252-257 (1982).

The court's holding in *Crow Tribe* is consistent with *Montana v. United States, supra.* There the Court held that the tribe did not have the authority to apply its hunting and fishing ordinance to non-Indians on non-Indian fee lands within the reservation to the exclusion of state regulations where there was nothing to show that the non-Indian hunting and fishing activity threatened the tribe's political or economic security or that the tribe's subsistence or welfare was otherwise threatened. *United States v. Montana, supra,* 450 US at 566.

In the present situation we have noted that the closely interspersed Indian and non-Indian ownerships within the diminished reservation would make it difficult for two distinct systems of land use regulation to coexist effectively and harmoniously. Moreover, unlike the *Montana* case, there is a recent history of the application of Indian land use regulations to non-Indian fee lands within the diminished reservation.

Accordingly it is our opinion that within the diminished reservation, the Confederated Tribes can make a strong argument that they have the *exclusive* right to promulgate and apply a zoning ordinance to all lands, Indian and non-Indian alike in order to protect the tribes' health or welfare and, perhaps, even their political integrity and economic security, as well. In the context of the *Montana* case and the recent decisions in *Cardin, Knight,* and *Namen,* all *supra,* it is our opinion that such a claim would probably be upheld.

As to non-Indian fee lands outside the diminished reservation but within the original treaty boundaries, it appears to us that the question of the Confederated Tribes' authority to regulate such lands will depend upon how persuasive (FN6) a case the Tribes can muster factually to support their sovereign interest in regulating isolated non-Indian parcels outside the diminished reservation. (FN7)

SECOND QUESTION PRESENTED

Having determined that the Indians in all probability have the exclusive right to regulate non-Indian lands within the limits of the diminished reservation and may have authority to regulate other non-Indian fee lands within the remainder of the original reservation, (FN8) we reach the second question, which is whether the constitutional rights of non-Indians residing on the reservation would be violated because they are not given voting representation on the land use committee.

The answer is no. The Bill of Rights cannot be invoked against tribal action unless Congress has explicitly so provided. *Santa Clara Pueblo v. Martinez,* 436 US

49, 56-57 (1978); *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen, supra,* 665 F2d 951 at 964 (n 31). Congress has so provided in 25 USC secs 1301-1303. (FN9) *Santa Clara Pueblo v. Martinez, supra,* 436 US at 57. However, as long as the land use code bears a rational relationship to a stated objective, and as long as the code is reasonable and not arbitrary, the court will uphold the code against a charge that it violates the equal protection of the laws. *Village of Belle Terre v. Boraas,* 416 US 1, 7-8 (1974). *See also Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, Wyoming, supra,* 670 F2d at 903-904; *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen, supra,* 665 F2d at 964; *City of Highland Park v. Train,* 519 F2d 681 (7th Cir. 1975); *Confederacion de la Raza Unida v. City of Morgan Hill,* 324 F Supp 895 (ND Ca 1971).

In *United States v. Mazurie,* 419 US 544 (1975), the defendants who had been denied a tribal liquor license by the Wind River Tribes were convicted of introducing spirituous beverages into Indian country in violation of 18 USC sec 1154. The Court commented on the fact the defendants as non-Indians could not participate in tribal government saying:

> "The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in *Williams v. Lee,* 358 U.S. 217 (1959). In holding that the authority of tribal courts could extend over non-In-

dians, insofar as concerned their transactions on a reservation with Indians, we stated:

> " 'It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. *The cases in this Court have consistently guarded the authority of Indian governments over their reservations.* Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-566.' *Id.,* at 223 (citations omitted)." 419 US at 557-558. (Footnote reference omitted.)

In this instance the non-Indian fee owners are on the reservation presumably with the consent of Congress under the original Allotment Act of 1887, 24 Stat 388. In that status, they are subject to the laws of the Confederated Tribes governing the reservation because that is what Congress has provided or permitted. *See Williams v. Lee,* 358 US 217, 223 (1959). Accordingly, so long as the application of the proposed land use code to the non-Indian fee owners would not be arbitrary or discriminatory or otherwise constitutionally defective under 25 USC sec 1302, such owners could not validly complain. *United States v. Mazurie, supra,* 419 US 544 at 557-558 and n 12 at p 558; *Knight, supra,* 670 F2d at 903; *Namen, supra,* 665 F2d at 964 (n 31).

/s/ Dave Frohnmayer
Dave Frohnmayer
Attorney General

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1. Approximately 65 percent of the reservation population is non-Indian.

2. We have been unable to verify whether or not the zoning ordinance was also intended to apply to lands outside the diminished reservation but within the original treaty boundaries.

3. The original 1855 treaty boundaries include about one-fourth of the City of Pendleton. The diminished reservation does not include any portion of the City of Pendleton. We are informed by counsel for the Confederated Tribes that there is no present indication that the Confederated Tribes intend to apply their land use code to the City of Pendleton. Accordingly, the analysis and conclusions of this opinion are predicated on the assumption that the Tribes' land use code will not apply to the City of Pendleton. Whether the Tribes could validly apply their land use code to the portion of the City of Pendleton which lies within the original treaty boundaries is a question which we do not address in this opinion.

4. 28 USC sec 1360(a) provides:

> "Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> " . . . .
>
> "Oregon . . . . . All Indian country within the State, except the Warm Springs Reservation."

5. Nevertheless, under Public Law 280 the states retain the regulatory jurisdiction over the on-reservation activities of non-Indians that they enjoyed before that law. *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1279 (9th Cir. 1981).

6. The result also may depend on whether as a legal matter the Tribes' reservation still encompasses the land outside the diminished reservation but still within the original treaty boundaries. We do not address this issue in this opinion.

7. There is of course a potential impact of tribal land use regulations on nearby territory and even on the state as a whole. However, major development within the reservation boundaries with significant effects beyond reservation boundaries would almost certainly require transportation and other off-reservation facilities. This suggests the necessity of cooperative land use decisions and agreements between the Confederated Tribes and the county and the state.

8. *See* footnote 3.

9. 25 U.S.C. sec. 1302 provides:

"No Indian tribe in exercising powers of self-government shall—

". . . .

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . ."

THE STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

[SEAL]

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October 19, 1982

Mr. James B. Mohr
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OAG 61-82

Dear Mr. Mohr:

You ask whether the Lac du Flambeau Band of Lake Superior Chippewa Indians has exclusive jurisdiction to regulate land use within the outer boundary of the Lac du Flambeau Reservation. You also ask whether the Band has authority to impose a moratorium on land division within the outer boundary of its reservation. It is my understanding that the Band recently rescinded its ordinance imposing such a moratorium and has no plan to reenact the ordinance within the foreseeable future. Consequently, this opinion will not address your second inquiry.

In this opinion, land tenure within the outer boundary of the Lac du Flambeau Reservation will be referred to either as "Indian land" or "fee land." Indian land includes land held in trust by the federal government, either for the Band or for individual Band members, together with land owned in fee by the Band and by Band members. Fee land refers to all land other than Indian land.

In my opinion, the Band has exclusive jurisdiction to zone all Indian land, and has jurisdiction concurrent with Vilas and Iron Counties to zone fee land located in each county unless it is established that county zoning would infringe on tribal self-government. If the exercise of county zoning jurisdiction infringes on tribal self-government, the Band would have exclusive zoning jurisdiction within the reservation.

The United States Supreme Court has repeatedly stated that Indian tribes retain attributes of sovereignty over both their members *and their territory. See Merrion v. Jicarilla Apache Tribe,* 102 S. Ct. 894 (1982); *Montana v. United States,* 450 U.S. 544, 563 (1981); *United States v. Mazurie,* 419 U.S. 544, 557 (1975). A tribe's territorial jurisdiction has been held to include in many cases all land within its reservation boundaries. *See, e.g., Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) and *United States v. Wheeler,* 433 U.S. 313 (1978). A tribe's sovereign power is not derived from an Act of Congress, but is an inherent power which has never been extinguished. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). One aspect of a tribe's inherent sovereign power is the authority to zone all land within the reservation boundaries. *See, e.g., Knight v. Shoshone & Arapahoe Indian Tribes, etc.,* 670 F.2d 900 (10th Cir. 1982). *See also Confederated Salish & Kootenai Tribes, etc. v. Namen,* 665 F.2d 951, 962-64 (9th Cir. 1982), U.S. *appeal pending,* No. 82-22 (July 1, 1982).

An Indian tribe has the power to zone all land within its reservation unless divested of such power by federal law or necessary implication of its dependent status. *Cf.*

Merrion; Washington v. Confederated Tribes, 447 U.S. 134 (1980). Congress has not acted to deny Indian tribes the right to control through zoning the use of land located within their territorial jurisdiction. Nor, in my opinion, is such right denied by implicaton as a necessry result of an Indian tribe's dependent status.

In my opinion, the state has no power to zone Indian lands within the outer boundary of the Lac du Flambeau Reservation. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 425 U.S. 1038 (1977). *See generally* 65 Op. Att'y Gen. 276 (1976). It follows that the Band's zoning authority over such land vis-a-vis the state is exclusive. The issue of whether the state has authority to zone fee land within the Lac du Flambeau Reservation is less clear.

The authority of local governments to regulate land use through zoning was recognized by the Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365 (1926). Such zoning is considered an exercise of the sovereign police power to protect, among other things, the health, safety, morals or general welfare of the community. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

The basic test for determining whether state or local governments have any regulatory authority within reservation boundaries was considered by the Supreme Court in *Williams v. Lee,* 358 U.S. 218 (1959). The Court held: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

Since a tribe has a significant governmental interest in controlling any conduct or activity within its territorial jurisdiction that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana,* 450 U.S. at 566, it is likely that state regulation of the same subject matter would infringe on the tribe's powers of self-government. Concurrent state and tribal regulation of land use within a reservation, or the existence of a situation where the state and the tribe each zone different areas of a reservation in a checkerboard fashion, would be impractical. Unless both governmental authorities have similar long range planning goals, the two zoning plans may contradict and defeat each other. If such were the case, state zoning would probably infringe on tribal self-government and would be unenforceable. *Cf. Mescalero Apache Tribe v. State of N. M.,* 630 F.2d 724 (10th Cir. 1980), *vacated,* 450 U.S. 1036 (1981), *reinstated,* 677 F.2d 55 (10th Cir. 1982); *compare Washington.*

If both plans are substantially similar, then the need for dual regulation is minimized. Because state regulation cannot be applied to Indian lands, tribal zoning appears to be the only means to achieve comprehensive land use planning on reservations with mixed land ownership.

Two important related issues that arise in the context of tribal zoning of all reservation land which involve the rights of non-Indian land-owners merit comment. First, because non-Indians do not usually have the right to participate in tribal governments, there must be concern for the equal protection and property rights of non-Indians in the administration of the zoning plan. Second, non-

Indians must have a judicial forum within which to pursue those rights.

Under the Indian Civil Rights Act, 25 U.S.C. sec. 1302, no tribe shall: "(5) take any private property for a public use without just compensation; . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

These provisions, substantially similar to the relevant provisions of the United States Constitution, protect non-Indians as well as Indians in the enjoyment of their rights vis-a-vis tribal government. The rights of non-Indians are enforceable in the tribal courts. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Martinez*, 436 U.S. at 65.

While there may be some concern that non-Indians are not represented in tribal governments, the Supreme Court has held that fact to be immaterial. *Williams*, 358 U.S. at 223; *Mazurie*, 419 U.S. at 557-58. *Cf. Merrion*, 894 S. Ct. at 906-07.

In my opinion, the Lac du Flambeau Indian Band has exclusive authority to zone Indian land, and has concurrent jurisdiction with the state to zone fee land within the

tribe's reservation boundaries unless county zoning would infringe on tribal self-government.

Sincerely yours,

/s/ Bronson C. La Follette
Bronson C. La Follette
Attorney General

BCL:JDN:aag

CAPTION:

The Lac du Flambeau Indian Tribe has exclusive authority to zone Indian land, and has concurrent jurisdiction with the state to zone private property within the tribe's reservation boundaries unless county zoning would infringe on tribal self-government.

12/19/80

EPA POLICY FOR PROGRAM ADMINISTRATION ON AMERICAN INDIAN RESERVATIONS

The Reservation Environment

American Indian reservations represent a significant sector of our country and its environment. The home and remaining land base for over 200 Indian tribes, reservation lands cover an area larger than the six states of New England and in addition, the states of New Jersey, Delaware and Maryland.

These lands and their environmental problems are marked by contrast. Generally, they are characterized by vast distances, sparse populations and largely pristine environments. The environmental problems of the reservations are usually those common to rural America: safe drinking water and adequate sewer and waste disposal facilities. On the other hand, some reservations are located in urban areas, virtually surrounded by cities such as Phoenix and San Diego. And some reservations face the prospect of large-scale energy development, either on-reservation or nearby, with potentially massive environmental consequences for reservation lands.

There are over 250 Federally-recognized tribal governments with authority over reservation affairs. Commonly, tribal governments have tripartite functions, with executive, legislative and judicial responsibilities. Their court systems have the underlying civil jurisdiction to regulate on-reservation activities of non-Indians as well as tribal members.

In recent years, the reservations have witnessed a resurgence in Indian cultural interests and governmental

self-confidence. This has produced a growing tribal pressure to overcome their long-standing, historical exclusion from Federal decisionmaking (which in the past has largely been the province of non-Indians) that critically affects the future of reservation life.

A keynote of the growing tribal strength is a call for tribal "self-determination," the concept that Indian tribes can and should have the power to make, and carry responsibility for decisions affecting the future of reservation life. Self-determination has been recognized as a fundamental principle of Federal Indian Policy by recent Republican and Democratic administrations, and by Congress in the Indain Self-Determination Act of 1975 (P.L. 93-638).

Although all tribes are not alike, and although every tribe is subject to the human pressures that beset any government, tribal governments have generally shown a notable concern for decisionmaking which is protective of the future of Indian cultures, lands, and environment, as well as economic welfare. The conditions under which tribal authorities govern are not easy, but tribes have established impressive credentials for refusing to accept easy solutions. Despite most tribes' severe economic need, there are persistent examples of tribal decisions to avoid uncontrolled financial solutions where the long-range social and environmental effects were unacceptable.

Unique Problems Affecting Federal Regulatory Approaches to American Indian Reservations

Indian tribes and reservations, due to historical facts including treaties and the evolution of Federal law from the drafting of the Constitution to today, occupy a dis-

tinct place in our Federal system, somewhat different from that of the fifty states.

Although tribes are fully subject to Federal law and no longer interact with the Federal government through treaty-making, they retain the essential attributes of their original sovereignty. In addition, they retain certain rights established by earlier treaties and enjoy certain other rights assured by the Federal government and acknowledged at the time of the cessation of treaty-making. These latter rights are generally discussed in terms of the Federal Government's "trust responsibility" towards Indian tribes and lands.

In its broadest sense, the trust responsibility conveys a special Federal responsibility to foster and generally protect tribal interests and welfare. More often, the trust responsibility is discussed in connection with a specific Federal responsibility with regard to Indian land, to protect its value and, inherently, its environmental quality.

Another consequence of this special legal status of Indian tribes in our Federal system is that the states generally have only limited authority to regulate activities conducted on Indian reservations. This fact is particularly important to EPA because most of our statutes include a regulatory design utilizing state governments as entities for implementing, at the local level, coordinated Federal-state programs for the attainment of nationally-set goals and standards.

As state governments usually lack, on Indian reservations, the kind of power and regulatory authority they enjoy off-reservation, they cannot, in these cases, fulfill

on Indian lands the full regulatory role originally designed by Congress for the local implementing government. Nor does Congress generally provide for state assumption of such regulatory power over reservation affairs. Where allowed, any such assumption is strictly and carefully controlled.

Furthermore, the responsibilities and activities of the Bureau of Indian Affairs and the Indian Health Service are concerned primarily with the delivery of services on Indian lands and are not essentially regulatory in nature. As a consequence, these agencies cannot be expected to fulfill a direct regulatory role for reservation lands under the EPA statutes.

In recent legislation, particularly the Surface Mining Control and Reclamation Act of 1978, Congress confronted the problem of the legal limits on the ability of state governments to implement national regulatory programs on Indian reservations. In keeping with the general concept of tribal self-determination, Congress asked the Office of Surface Mining (OSM, at DOI) to recommend appropriate legislative language to allow tribal governments to fill the regulatory gap left by the states' jurisdictional shortfall.

Hence, without some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. Such a result is unacceptable. "The spirit of our Federal trust responsibility and the clear intent of Congress demand full and equal

protection of the environment of the entire nation without exceptions or gaps under the programs for which EPA is responsible."

Finally, EPA must administer its programs in the context of public and community realities and of Federal policy towards program administration on Indian lands. In both respects, there is an unmistakable affirmation that Indian people, acting through their elected tribal governments, should have a primary role in the implementing decisions of Federal programs which affect the future of reservation life. This momentum results from the growth in strength and sophistication of tribal governments and a corresponding shift in Federal responses from an earlier, somewhat paternalistic attitude, towards one favoring self-determination. These factors—the Federal and tribal affirmations of the principle of tribal self-determination, the unique legal status of reservation lands and corresponding jurisdictional limits of state governments, and the special trust responsibility to safeguard reservation lands which the Supreme Court has placed upon the Federal establishment—all affect our Federal regulatory and programmatic responsibilities on Indian reservations in a manner that is unique.

These distinguishing factors affecting Federal program administration on Indian reservations become doubly important when we remember that they affect EPA's responsibilities over a land mass larger in area than the total of the New England states, New Jersey, Delaware and Maryland.

Why an Indian Policy

We are establishing a policy for implementing EPA programs on Indian reservations because:

• The unique legal status of reservation lands and the corresponding short-fall in state authorities there combine to require EPA to take a special approach to ensure that Indian lands receive the degree of protection which our Congressional mandate requires for the entire nation.

• Indian governments have the fundamental legal jurisdiction, generally lacked by state governments, to regulate both Indian and non-Indian pollution sources on the reservations. As tribal governments are increasingly showing an interest in (and the capability of undertaking) environmental regulatory programs, we want to support and encourage these environmental and regulatory predilections. The tribal interest and potential capability in the environmental arena constitute a national resource with environmental benefits extending beyond the reservation boundaries. As a Federal regulatory agency, we have an opportunity to foster and support the environmental interests of the natural allies we have in our sister governments.

• The environment is generally best protected by those who have the concern and the ability to protect it. Indian people show an acute sensitivity to their loss of great tracts of this country. Ever since the establishment of the original reservations by treaty, the Indian land base has shrunk to a minor fraction of the original reservations. This historical fact, combined with a long-standing cultural respect for the earth and its environment, is

reflected in tribal expressions of concern for the land, its irreplaceability, and the importance of its environmental quality.

Certainly, if the principle favoring local stewardship of the environment has meaning anywhere, it is on the Indian reservation. This argument has been asserted many times by tribal leaders seeking an increased involvement and participation in carrying out EPA programs on reservation lands. We want to support this principle for Indian lands, i.e. that the Indian people themselves are in the best position to protect the quality of the environment on the reservations where they live.

• Confused and often contradictory decisions regarding programs on Indian reservations have in the past frustrated efforts to address specific environmental problems by various EPA regional and program offices and by tribes, states and local governments. A clear and coherent policy is necessary to provide basic guidance and to form the basis for consistent decisionmaking.

• In addition, individual programs and regions have exercised initiatives in dealing with the particular problems of program implementation on Indian lands while others have made little or no progress. We need to build on the experience of the leaders within the Agency and, by carrying out a consistent Agency-wide policy, bring all parts of the Agency to a level of activity and progress consistent with that achieved by the Agency leaders.

Policy Statement and Principles

It is EPA policy to promote comprehensive environmental management by both states and tribes consistent

with the overall aims and objectives of Federal environmental statutes. The Agency will also follow the general Federal policy in support of tribal self-determination; that is, that Indian people should have a central role in decisions affecting the future of reservation life.

It is EPA policy to:

* Adapt and manage our national programs in response to the particular legal and political circumstances of Indian reservations so as to assure that these programs protect health and the environment on Indian reservations at least as effectively as elsewhere; and

* Promote an enhanced role for tribal government in relevant decisionmaking and implementation of Federal environmental programs on Indian reservations.

In support of these goals, EPA program managers will carry out their duties in a manner consistent with the following policy principles:

* EPA supports the principle of Indian self-determination and intends to follow this principle to enhance environmental protection on American Indian reservations. EPA will promote opportunities for tribal governments to assume a central role in implementing EPA's delegable Federal environmental programs and activities.

* Where tribes assume responsibilities for implementing Federal pollution programs, they will be expected to meet stringent standards, similar to those imposed on states, in order to assume programs. The Agency will work with tribes assuming such responsibilities to encourage the participation of affected parties in decisionmaking concerning the reservation area. A high priority

will be placed on working with tribes to enable them to meet and maintain these standards.

We recognize that, while tribes have the underlying civil jurisdiction to regulate reservation pollution sources, not all tribes have the present interest or administrative capability to carry out EPA programs in the manner that states do for non-Indian lands. Therefore, it must be clearly understood that EPA intends to provide tribes, where feasible, with the *option* to participate. EPA cannot and does not want to force or pressure individual tribes into assuming an unwanted role.

* Where tribes do not administer Federal pollution control programs on Indian lands, those activities and aspects of regulatory programs which states do not or cannot carry out on reservation lands will be administered by EPA. EPA is committed to assuring that the administration of Agency programs is as comprehensive and effective on Indian reservations as elsewhere.

* Where tribes do not assume responsibility for Federal program implementation, EPA will work with the tribes upon request to define other, more appropriate roles which they might take.

* Cooperation between tribal and state governments may be able to serve the mutual interests of both governments. Where such cooperation is working effectively or

where such cooperation is agreeable to all concerned parties, it should be recognized and encouraged. Effective pollution control often requires inter-governmental cooperation, and this should be fostered where appropriate.

Implementation

A statement of policy goals and principles is in itself not enough to effect changes or improvements in our program administration on Indian lands. They must be reflected in actions taken with responsiveness, intelligence and initiative at all levels of the Agency. Thus, I am taking several steps to help ensure that this policy is fully and effectively implemented.

- First, I am directing program managers to begin immediately to respond as fully as possible to tribal requests and problems so as to allow tribal governments to play a larger and more significant role in environmental programs on Indian reservations.

- Second, I am directing program managers to begin immediately to seek input from tribal governments when making EPA program decisions affecting reservation lands. Where EPA carries responsibility for implementing programs on Indian lands, a special effort must be made to assure that affected tribal governments have a meaningful voice in our implementation of those programs.

- Third, I am directing the Director, Office of Environmental Review, to coordinate, in conjunction with the Indian Work Group (IWG), program managers and Office Directors, a review of EPA's existing legal charter (both statutes and regulations) and to identify and pursue modi-

fications necessary to (a) resolve the regulatory problems currently arising from limitations to state jurisdiction on Indian reservations, and (b) allow tribal governments the option to play a central and significant role in implementing our programs on Indian reservations.

* Fourth, I am directing the Director, Office of Environmental Review, to develop, in coordination with the Indian Work Group and key program managers and Office Directors, an Agency Implementation Plan, to carry the forces of Agency policy, listing specific Agency activities which, in addition to those listed above, will lead to the orderly and effective realization of this policy. EPA has already identified numerous issues which must be considered in developing detailed policy implementation proposals. Such issues, for instance, pertain to resource requirements, tribal/state relations and cooperative efforts with other Federal agencies. In this regard, individual program and regional offices have already set a precedent demonstrating the Agency's ability to deal with these issues in carrying out the basic objectives of this policy.

* Fifth, I am directing the Director, Office of Environmental Review, in conjunction with the Indian Work Group and key program managers and Office Directors, to undertake periodic review of Agency program implementation acivities affecting Indian lands, and to develop such other principles of policy and guidance on specific issues to be included as amendments to this policy as necessary to carry out the overall objectives of this policy in an orderly and rational manner.

Finally, a key to the successful implementation of this policy is the coordination of EPA and tribal efforts, along

with the related efforts of IHS, BIA and other Federal agencies and state and local governments, to protect and enhance the environment of reservation lands. To help accomplish this important aim, EPA officials must remain constantly exposed to a range of reservation experiences and information, and must maintain contact with those people who represent tribal viewpoints and are working to meet reservation concerns. The emphasis on ongoing, institutionalized follow-up and non-Federal involvement is intended to provide a climate conducive to the development and execution of policies, programs, and initiatives which are sensitive to reservation needs and circumstances.

/s/ Barbara Blum
Barbara Blum

Deputy Administrator

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protective Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory acivities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance enviromental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protective Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (*i.e.* responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neigh-

boring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the dis-

tinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABLITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed

to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

/s/ William D. Ruckelshaus
William D. Ruckleshaus